[4910-EX-P]

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 386 and 387

[Docket No. FMCSA-2016-0102]

RIN 2126-AC10

Broker and Freight Forwarder Financial Responsibility

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: FMCSA proposes the implementation of certain requirements under the Moving Ahead for Progress in the 21st Century Act (MAP-21). Previously, FMCSA implemented the MAP-21 requirement to increase the financial security amount for brokers from $25,000 to $75,000 for household brokers and from $10,000 to $75,000 for all other property brokers and, for the first time, established financial security requirements for freight forwarders. The agency proposes regulations in five separate areas: Assets readily available; immediate suspension of broker/freight forwarder operating authority; surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency; enforcement authority; and entities eligible to provide trust funds for form BMC-85 trust fund filings.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number FMCSA-2016-0102 using any of the following methods:

- Federal eRulemaking Portal: Go to https://www.regulations.gov/docket/FMCSA-2016-0102/document. Follow the online instructions for submitting comments.

• Mail: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

• Hand Delivery or Courier: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

• Fax: (202) 493-2251.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey L. Secrist, Chief, Registration, Licensing, and Insurance Division, Office of Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001 or by phone at (202) 385-2367; Jeffery.Secrist@dot.gov. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366-9826.

SUPPLEMENTARY INFORMATION:

FMCSA organizes this notice of proposed rulemaking (NPRM) as follows:

I. PUBLIC PARTICIPATION AND REQUEST FOR COMMENTS

A. Submitting Comments

If you submit a comment, please include the docket number for this NPRM (FMCSA-2016-0102), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to https://www.regulations.gov/docket/FMCSA-2016-0102/document, click on this NPRM, click "Comment," and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic

filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

Confidential Business Information (CBI)

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as "PROPIN" to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the NPRM. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Viewing Comments and Documents

To view any documents mentioned as being available in the docket, go to https://www.regulations.gov/docket/FMCSA-2016-0102/document and choose the document to review. To view comments, click this NPRM, then click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there

to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

C. Privacy

DOT solicits comments from the public to better inform its regulatory process, in accordance with 5 U.S.C. 553(c). DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL 14 – Federal Docket Management System), which can be reviewed at https://www.govinfo.gov/content/pkg/FR-2008-01-17/pdf/E8-785.pdf.

D. Comments on the Information Collection

Written comments and recommendations for the information collection discussed in this NPRM should be sent within 60 days of publication to www.reginfo.gov/public/do/PRAMain. Find this information collection by clicking the link that reads “Currently under Review - Open for Public Comments” or by entering Office of Management and Budget (OMB) information request control number 2126-0017 in the search bar and clicking on the last entry to reach the “comment” button.

II. EXECUTIVE SUMMARY

A. Purpose and Summary of the Regulatory Action

FMCSA proposes modifications to broker and freight forwarder financial responsibility requirements.

B. Summary of Major Provisions

This NPRM proposes modification in five regulatory areas.

Assets Readily Available. The NPRM proposes allowing brokers or freight forwarders to meet the MAP-21 requirement to have “assets readily available” by maintaining trusts that meet certain criteria, including that the assets can be liquidated

within 7 calendar days of the event that triggers a payment from the trust, and that do not contain certain assets as specified in this NPRM.

Immediate Suspension of Broker/Freight Forwarder Operating Authority. The NPRM proposes that "available financial security" falls below $75,000 when there is a drawdown on the broker or freight forwarder's surety bond or trust fund. This would happen when a broker or freight forwarder consents to a drawdown, or if the broker or freight forwarder does not respond to a valid notice of claim from the surety or trust provider, causing the provider to pay the claim, or if the claim against the broker or freight forwarder is converted to a judgment and the surety or trust provider pays the claim. FMCSA also proposes that, if a broker or freight forwarder does not replenish funds within 7 business days after notice by FMCSA, the agency will issue a notification of suspension of operating authority to the broker or freight forwarder.

Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency. FMCSA proposes to define "financial failure or insolvency" as bankruptcy filing or State insolvency filing. This proposal also requires that if the surety/trustee is notified of any insolvency of the broker or freight forwarder, it must notify FMCSA and initiate cancelation of the financial responsibility. In addition, FMCSA proposes to publish a notice of failure in the FMCSA Register immediately.[1]

Enforcement Authority. FMCSA proposes that to implement MAP-21's requirement for suspension of a surety provider's authority, the agency would first provide notice of the suspension to the surety/trust fund provider, followed by 30 calendar days for the surety or trust fund provider to respond before a final Agency decision is issued. The agency also proposes to add penalties in 49 CFR part 386, appendix B, for violations of the new requirements.

[1] The FMCSA Register is available at https://li-public.fmcsa.dot.gov/LIVIEW/pkg_menu.prc_menu.

Entities Eligible to provide Trust Funds for BMC-85 Filings. FMCSA proposes to remove the rule allowing loan and finance companies to serve as BMC-85 trustees.

C. Costs and Benefits

Brokers and freight forwarders, surety bond and trust fund providers, and the Federal Government would incur costs for compliance and implementation. The quantified costs of the proposed rule include notification costs related to a drawdown on a surety bond or trust fund, and immediate suspension proceedings, FMCSA costs to hire new personnel, and costs associated with the development and maintenance of the BMC-84/85 Filing and Management Information Technology (IT) System. As shown in Table 1, FMCSA estimates that the 10-year cost of the proposed rule would total $5.4 million on an undiscounted basis, $3.8 million discounted at 7 percent, and $4.6 million discounted at 3 percent (all in 2020 dollars). The annualized cost of the rule would be $545,505 discounted at 7 percent and $542,343 at 3 percent. Ninety-eight percent of the costs would be incurred by the Federal Government.

Table 1. Total Cost of the Proposed Rule (in 2020 $)

Year	Undiscounted				Discounted	
	Brokers and Freight Forwarders	Financial Responsibility Providers	Federal Govt.	Total[(a)]	Discounted at 7 percent	Discounted at 3 percent
2025	$2,600	$3,800	$691,900	$698,200	$652,600	$677,900
2026	$2,800	$4,100	$512,000	$518,900	$453,200	$489,100
2027	$3,100	$4,500	$512,000	$519,600	$424,200	$475,500
2028	$3,400	$4,900	$512,100	$520,400	$397,000	$462,400
2029	$3,700	$5,400	$512,200	$521,300	$371,700	$449,700
2030	$4,000	$5,900	$512,300	$522,200	$348,000	$437,300
2031	$4,400	$6,500	$512,400	$523,300	$325,900	$425,500

2032	$4,800	$7,100	$512,500	$524,400	$305,200	$414,000
2033	$5,300	$7,700	$512,600	$525,600	$285,900	$402,800
2034	$5,800	$8,500	$512,700	$527,000	$267,900	$392,100
Total	**$39,800**	**$58,400**	**$5,302,700**	**$5,400,900**	**$3,831,400**	**$4,626,300**
Annualized					**$545,505**	**$542,343**

Notes:

(a) Total cost values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

This proposed rule would result in benefits to motor carriers. FMCSA is aware that some brokers improperly choose to withhold payment to motor carriers for services rendered. Motor carriers can then submit claims to the financial responsibility provider in an attempt to receive payment. If the financial responsibility provider has received claims against an individual broker that exceed $75,000, the financial responsibility provider will often submit the claims to a court in an interpleader action[2] to determine how to allocate the broker bond or trust fund. The interpleader process can be costly and time consuming for motor carriers, and generally results in motor carrier claims being paid pro rata, depending on the number of claims against the broker bond or trust fund. FMCSA believes that most brokers operate with integrity and uphold the contracts made with motor carriers and shippers. However, a minority of brokers with unscrupulous business practices can create unnecessary financial hardship for unsuspecting motor carriers.

FMCSA is relying on available data from which to draw an estimated percentage of how many brokers fail to pay motor carriers. The Agency's best estimate is that approximately 1.3 percent of brokers (approximately 440 in 2022) would experience a drawdown on their surety bond or trust fund within a given year, with average claim amounts of approximately $1,700 per claim submitted. Of these brokers, 17 percent may

[2] "By definition, interpleader is a suit to determine a right to property held by a disinterested third party who is in doubt about ownership and who deposits the property with the court so that interested parties can litigate ownership." *Scottrade, Inc. v. Davenport*, No. CV-11-03-BLG-RFC, 2011 WL 153999, at *1 (D. Mont. Apr. 21, 2011).

receive total claims in excess of $75,000, potentially leading to interpleader proceedings. Because this data is limited in scope, FMCSA cannot quantify benefits resulting from this proposal. It is FMCSA's intent that the provisions in this rule, if finalized, would mitigate the need to initiate interpleader proceedings and alleviate the concern of broker non-payment of claims.

III. ABBREVIATIONS

ANPRM	Advance Notice of Proposed Rulemaking
ATA	American Trucking Associations
CSBS	Conference of State Banking Supervisors
DOT	Department of Transportation
E.O.	Executive Order
FDIC	Federal Deposit Insurance Corporation
FMC	Federal Maritime Commission
FR	Federal Register
HHG	Household Goods
ILOC	Irrevocable Letter of Credit
IT	Information Technology
IRFA	Initial Regulatory Flexibility Analysis
MAP-21	The Moving Ahead for Progress in the 21st Century Act
NPRM	Notice of Proposed Rulemaking
NRSRO	Nationally Recognized Statistical Rating Organization
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OOIDA	Owner-Operator Independent Driver's Association
TIA	Transportation Intermediaries Association
Treasury	United States Department of the Treasury, Federal Insurance Office
UMRA	The Unfunded Mandates Reform Act of 1995
U.S.C.	United States Code

IV. LEGAL BASIS FOR THE RULEMAKING

In 2012, Congress enacted MAP-21 (Pub. L. 112-141, 126 Stat. 405, 822), section 32918 which contained requirements for the financial security of brokers and freight forwarders in amendments to 49 U.S.C. 13906(b) and (c). Section 32918(b) of MAP-21 (note to 49 U.S.C. 13906) directed the Secretary to issue regulations to implement and enforce the requirements under subsections (b) and (c) of section 13906. Authority to carry out and enforce these provisions has been delegated to the Administrator of FMCSA. (49 CFR 1.87(a)(5))

V. BACKGROUND

A "broker" is a "person…that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. 13102(2); see also 49 CFR 371.2(a)(FMCSA regulatory definition of "Broker"). A "freight forwarder" is defined as "a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business" (1) performs certain services including assembly, break-bulk or distribution services, (2) "assumes responsibility for the transportation from the place of receipt to the place of destination" and (3) "uses for any part of the transportation a carrier" such as a motor carrier. 49 U.S.C. 13102(8); see also 49 CFR 387.401(a)(FMCSA regulatory definition of freight forwarder).

Pursuant to 49 U.S.C. 13906(b),(c), brokers and freight forwarders must maintain financial security for the circumstance in which the broker or freight forwarder does not pay a motor carrier for services it provides. Prior to MAP-21, FMCSA required brokers to maintain financial security in the amount of $10,000 ($25,000 for household goods brokers). In MAP-21, Congress increased the broker financial responsibility requirement to $75,000 and extended those requirements to freight forwarders for the first time. (codified at 49 U.S.C. (b)(3), (c)(4)).

FMCSA implemented those MAP-21 financial responsibility limit requirements in a 2013 Omnibus rulemaking, 78 FR 60226 (Oct. 1, 2013), codified at 49 CFR 387.307(a) (brokers) and 49 CFR 387.403T(c) and 387.405 (freight forwarders). As a condition to obtain registration, brokers and freight forwarders must provide evidence of either a surety bond by filing a form BMC-84 or a trust fund by filing a form BMC-85 with the Agency.

A. Rulemaking History

In May 2016, FMCSA gathered stakeholders for an informal roundtable discussion on broker/freight forwarder financial responsibility (81 FR 24935, 24936, Apr. 27, 2016). Representatives of brokers, freight forwarders, motor carriers, surety providers, and trust fund providers participated in the roundtable and provided public comments to the docket established for the meeting. A transcript of this meeting is available in the docket for this rulemaking.

On September 27, 2018, FMCSA published an advance notice of proposed rulemaking (83 FR 48779) (ANPRM). The ANPRM indicated that the Agency was considering changes or additions in eight separate areas: Group surety bonds/trust funds; assets readily available; immediate suspension of broker/freight forwarder operating authority; surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency; enforcement authority; entities eligible to provide trust funds for form BMC-85 trust fund filings; Form BMC-84 and BMC-85 trust fund revisions; and household goods (HHG). The Agency sought comments and data in response to the ANPRM.

B. Related Activities

When considering the data FMCSA received from its ANPRM, the Agency sought input from two Federal regulatory agencies, and based upon their suggestions reached out to several non-Federal entities as well. FMCSA appreciates the information shared by these entities, some of which helped inform our responses to comments on the ANPRM below. FMCSA met with the following entities:

1. United States Department of the Treasury, Federal Insurance Office (Treasury) on September 24, 2020.

2. Federal Deposit Insurance Corporation (FDIC) on October 13, 2020. In addition to offering their own thoughts, FDIC representatives suggested that FMCSA contact the Conference of State Banking Supervisors (CSBS) regarding relevant State

regulations, sureties, trusts, and the regulation of broker and freight forwarder trust fund providers.

3. CSBS. FMCSA met with CSBS staff on October 14, 2020. FMCSA asked CSBS about oversight of financial companies including "loan or finance companies," as well as definitions.

4. Florida Office of Financial Regulation on February 4, 2021. FMCSA asked for input regarding State regulation of entities providing financial responsibility.

5. Texas Office of Consumer Credit Commissioner on February 11, 2021. FMCSA shared relevant regulatory text and forms, as well as information regarding BMC-85 trust fund filers based in Texas.

VI. COMMENTS AND RESPOSES TO THE ANPRM

FMCSA received 33 comments responsive to the ANPRM: 18 from individuals, 2 from a motor carrier and an owner-operator, 6 from trade organizations, 1 from a factoring company, 6 from surety providers or trust fund providers. Of the surety providers, one provided both BMC-84 surety bonds and BMC-85 trust funds and three provided BMC-84 sureties only. Two commenters provided BMC-85 trust funds. Seven commenters, including the Transportation Intermediaries Association (TIA), American Trucking Associations (ATA), and the Owner-Operator Independent Driver's Association (OOIDA), voiced their general support for the agency's plan to implement rulemaking. Two commenters objected to any rulemaking.

In the ANPRM, FMCSA asked for comments and data on eight areas related to broker and freight forwarder financial responsibility. To organize responses, the agency provided a list of 17 issues and asked commenters to address their comments to these issues (83 FR at 48786).

A. Group Surety Bond and Group Trust Fund

FMCSA specifically sought comment on the definitions of *group surety bond* and *group trust fund* and how the agency could administer such a group surety or trust option given its limited resources.

Definition of Group Surety Bond or Group Trust Fund including Responses to "How Could the Agency Administer a Group Surety Bond or Group Trust Fund?"

Only one commenter attempted to provide a definition of *group surety bond*. The surety provider would define a *group bond* to mean "any number of Freight Brokers and/or Freight Forwarders who operate as a group or association under the MAP-21 section 32918 and file a surety instrument collectively to ensure compliance individually to the financial responsibility requirement of the above section. This surety instrument shall be available to pay any claim pursuant to the above regulations." Based on the success of the Federal Maritime Commission (FMC) in administering a group surety bond option, this commenter recommended that FMCSA follow the guidelines of the FMC group bond, stating that FMCSA and FMC share common objectives. A trade organization appeared to define *group financial responsibility* by referencing the FMC regulations in 46 CFR 515.21(b). It also recommended that FMCSA follow FMC's lead.

A trade organization stated that while multiple bond principals may be covered under a single bond, there is no specific definition of what constitutes a group bond. It noted that a bond with multiple principals is far less common than one with a single principal. The commenter believed that such a bond program would require the formation of a group or association of principals that have agreed among themselves to accept liability for the total financial responsibility and bonded activities of the group. The surety could then underwrite the bond, prequalifying each principal.

Another trade organization opposed any attempt to define group surety bonds or group trust funds. It maintained that any attempt would waste FMCSA's resources and harm motor carriers and drivers. Two commenters agreed that group surety bonds or trust funds would create an administrative burden for FMCSA and present the possibility of

increased risk. They recommended that FMCSA not allow group trust funds or group bonds.

A trust fund provider recommended the following guidelines for the group or association providing a surety instrument for its members and believed they would not encumber the agency. The recommended guidelines would include: 1) providing coverage using an internal letter of credit guaranteed by dedicated assets; 2) annually providing audited financial statements to confirm stated assets, accompanied by an opinion letter from the certified public accounting firm conducting the audit; 3) establishing financial responsibility in an internal letter of credit in an amount equal to the lesser of the total individual member's liability or the aggregate amount; and 4) having an aggregate of $3 million for the group bond (based on the model of the FMC group bond).

Regarding the freight broker industry, a surety provider believed there is no need for group surety bonds or group trust funds, "nor an appetite to offer it in the surety industry." The commenter wrote that the group surety bond or trust fund proposal does not provide an adequate model for the agency to ensure the levels of financial security as described by the statute. If FMCSA does not have the resources or expertise to regulate claims, the commenter recommended it not consider adding another option to satisfy the financial guarantee requirement.

In the absence of any evidence that demand for broker/freight forwarder securities cannot be met if the agency does not accept group sureties or trust funds, one trade organization commented it would be difficult to justify the burden for FMCSA of monitoring the sufficiency of group instruments. This commenter believed carriers would be wary of the uncertainty if brokers and freight forwarders were permitted to meet their financial responsibility requirements through group securities, which would open the door to a lower aggregate amount of assets available to pay claims.

Comments on the FMC Model. A surety provider commented that providing a definition for a *group trust fund* would be difficult, "as the FMCSA would be the first in the nation to accept such an instrument." It noted that the FMC group surety bond is not a group bond/trust but a group surety bond, backed by insurance carriers that are regulated by government agencies other than the FMC. The commenter wrote that such a group trust fund would need to have a dollar funded in the trust for each dollar of liability: if a group trust fund had 100 freight brokers in the group, it would require $7.5 million ($75,000 x 100) in funds available. Anything less "provides no benefit over a singular BMC-85 trust fund, but many distinct disadvantages [that] would pose additional risk." Another commenter, a trade organization, recommended that the agency simply require individual surety bonds based upon the FMC requirements. It wrote that FMCSA should not accept group surety bonds and trust funds until the agency fulfills the basic requirements to ensure that BMC-85 trusts are fully funded.

Another trade organization believed the approach used by the ocean transportation industry may not be transferable to highway transportation because the two industries are drastically different, and the oversight exerted by FMC and FMCSA is also vastly different. Another surety provider provided background on FMC's rules, and reported that nearly 90 percent of foreign firms, and nearly 97 percent of all non-vessel operating common carriers, do not choose to make use of a group alternative. Noting this minimal use of FMC's group instrument, this commenter believed that individual bonding is sufficient to meet the needs of the marketplace and any group bond or trust is not necessary. This commenter also noted that, while the FMC regulations provide for a maximum liability limit of $3 million for a group bond, each member listed is required by regulation to maintain an individual level of financial responsibility of $75,000 (if in the U.S.) or $150,000 (if foreign). This commenter stated that, if FMCSA adopts the use of a

group bond or group trust, the instrument cannot be allowed to provide any amount of coverage less than that which each member would provide the public individually.

FMCSA response: FMCSA is not proposing new regulations concerning group surety bonds or trust funds. FMCSA considered proposing a definition, including those definitions submitted in the comments, but ultimately declines to do so. There was no consensus or commonly used definition of *group bond* or *group fund*, and several commenters supporting the use of group instruments also pointed out areas of concern. While some commenters advocated for the inclusion of a group surety bond or trust fund, the benefits were not well-explained or quantified by commenters. Moreover, the TIA, which appears to have supported inclusion of the group option in MAP-21 based upon the FMC model, later acknowledged that such an option was not transferrable to freight brokers or freight forwarders.

FMCSA agrees with the commenter who noted that there is no evidence that the demand for individual instruments is not being met and that it would be difficult to justify the burden on FMCSA to monitor group instruments. FMCSA also finds it highly compelling that the original proponent of the group model no longer supports its inclusion as an option. In addition, FMCSA agrees with commenters that if the agency were to propose this group option, FMCSA would need to increase oversight to combat fraud. Given that FMCSA is primarily responsible for safety regulation and does not have extensive expertise in or resources for financial regulation, the agency believes focusing on existing financial tools to be the best use of its resources.

Due to the complexity and lack of an existing regulatory definition, FMCSA declines to propose allowing group surety bonds or group trust funds to provide financial responsibility.

Other Comments Related to Group Surety Bonds or Group Trust Funds

By following FMC's lead and allowing group financial security for surface transportation intermediaries, one trade organization believed FMCSA could "minimize the devastating effect of the anti-competitive $75,000 financial security imposed by Congress."

A surety provider wrote that if FMCSA allows group surety bonds or trust funds, the surety industry will not offer them as an option, because the surety industry underwrites each freight broker on its own merits, not in groups. This commenter noted further that, because the FDIC provides insurance coverage of $250,000 per depositor per FDIC-insured bank, each trustee should establish a separate bank account for every trust filed, in order to minimize the risk of claims.

FMCSA response: FMCSA appreciates these comments. As noted above, FMCSA declines to propose allowing group surety bonds or group Trust Funds to provide financial responsibility.

B. Assets Readily Available

MAP-21 Section 32918 required that trust funds or other financial security be limited only to "assets readily available to pay claims without resort to personal guarantees or collection of pledged accounts receivable." 49 U.S.C. § 13906(b)(1)(C) and (c)(1)(D). The agency asked for suggestions from the trust fund industry and others about instruments the agency could accept that would meet the "assets readily available" standard without requiring significant FMCSA oversight or evaluation that would divert scarce safety oversight resources.

How Should Assets Readily Available Be Defined?

In the ANPRM, the agency wrote that it is committed to adopting a definition of *assets readily available* for BMC-85 trust fund assets that both implements the will of Congress and is reasonable for the agency to administer. FMCSA wrote it was considering proposing a definition of *assets readily available* that would include cash or

letters of credit from FDIC-approved banks, but said it was open to other options. (83 FR 48783)

A number of commenters agreed that assets readily available should include only cash or letters of credit from FDIC-approved banks, with others indicating cash bonds should be allowable; some of these commenters noted that only cash or equally liquid assets would satisfy the statutory mandate. A surety provider noted that the May 2016 roundtable discussion on this subject provided a general consensus that cash and letters of credit drawn on FDIC-approved banks should be acceptable. A trade organization commented that FMCSA must require trusts to be funded with cash or an equally liquid equivalent asset, such as an irrevocable letter of credit drawn on a federally regulated bank or trust company. One trade organization believed the only sufficient trust fund or surety funding sources are cash and an unconditional FDIC insured letter of credit, with the funds placed in a segregated account to be used solely for carrier claims.

These commenters stated that finance bonds should not be allowed, and that BMC-85s exist only because FMCSA allows them; FMCSA therefore should regulate and provide oversight of them.

Some commenters were concerned that some BMC-85 trustees may be comingling the available financial securities of brokers with other brokers' securities and even with the trustee's general operating accounts. A commenter wrote that the use of "unknown, hybrid, and possibly unenforceable internal debt instruments in lieu of cash or FDIC insured letters of credit violates the fiduciary responsibilities of BMC-85 trustees and undermines the objective of ensuring that brokers can personally meet the statutory financial requirements." Some commenters, including a trade organization, recommended FMCSA allow letters of credit in the interest of making broker licenses accessible to start-up businesses and preventing unreasonable obstacles to entry. An individual commented that it is crucial that FMCSA support "the BMC-85 insurance products

currently available to brokers in lieu of forcing brokers to have $75,000 available in cash at all times to pay claims." This commenter believed that larger third-party logistics and broker entities otherwise will force smaller companies out of business, which will enable those larger companies to drive up rates. A commenter questioned whether FMCSA can limit the interpretation of "assets readily available" beyond saying that they are not personal guarantees or a collection of pledged accounts receivable, as provided in MAP-21. However, this commenter proposed using its "internal letter of credit plan," $75,000 in cash, and/or a combination of a letter of credit supplied by an FDIC-insured bank to the surety provider. If interpretations relating to financial responsibility proposed by BMC-84 suppliers are implemented, this commenter believed, several BMC-85 providers may be forced out of the marketplace and the choices available to freight brokers and forwarders could be severely limited.

Another commenter believed the definition of "assets readily available" should be expansive enough to include "all kinds of investments." The commenter wrote that the term should include publicly traded securities that can be quickly bought and sold on a highly regulated open market exchange. The commenter noted that, in reality, claims are not paid before 30 days of the claim being filed.

A trade organization encouraged the agency to adopt a definition of assets readily available to include the assets set forth in Federal Acquisition Regulation 28.204-1-28.204-3, which applies to the type of securities that may be deposited by a contractor in lieu of a surety bond on public works. The types of assets are: 1) notes or bonds issued by the U.S. Government; 2) certified or cashier's check, bank draft, postal money order, or currency; or 3) an irrevocable letter of credit issued by a federally insured financial institution rated investment grade. The commenter maintained that a broader and riskier asset class would require more intensive monitoring and ongoing valuation by the agency to ensure that the BMC-85 trust fund remains capitalized over the $75,000 requirement.

FMCSA response: In an effort to provide flexibility, FMCSA proposes only a list of prohibited asset types. FMCSA further specifies that assets considered readily available be able to be made liquid in 7 days. FMCSA believes that its approach strikes the best balance between allowing multiple ways of complying with the assets readily available requirement for small businesses and still setting a high standard that will protect motor carriers and shippers.

Suggest a Process That Would Allow FMCSA to Accept Letters of Credit and Other Instruments Without Significant Oversight

BMC-84 bond providers are overseen by the Treasury, while BMC-85 trusts are overseen by FMCSA, in addition to other regulators. The agency solicited suggestions about how it could accept letters of credit and other instruments that could meet the assets readily available standard for broker/freight forwarder trust funds without requiring significant oversight or evaluation that would divert scarce agency safety resources. (83 FR 48783)

A trade organization wrote that the acceptance of any third-party collateral instrument, personal guarantees, or a pledge of business assets should not be considered eligible trust collateral unless the agency is satisfied with the financial structure of the issuer/obligor and that it possesses unimpeded access to assets in the event of payment demand. Because such information is not currently available to the FMCSA or to motor carriers, any attempt to define or administer such an option would be wasteful of FMCSA resources and harmful to the motor carriers and drivers.

A trade organization recommended the agency require the trust to conduct a regular, independent audit confirming that the trust is fully funded. It commented that a broader and riskier asset class might impair the value of the BMC-85 trust fund, trigger a suspension required under 49 U.S.C. 13906(b)(5) and (c)(6), and require more intensive monitoring and ongoing valuation by the agency. A surety provider wrote that FMCSA

could verify annually that a letter of credit issued by an FDIC-insured bank is in force without hardship.

A surety provider suggested that the property broker or freight forwarder needs to deposit with the trust administrator cash or similar assets like Treasury debt instruments. It also believed that the trust could accept a qualified bank letter of credit (e.g., irrevocable and issued by an FDIC-insured bank), or a qualified surety bond (e.g., where the trust administrator is the bond obligee and the surety is listed on Treasury's Circular 570)—alternatives that provide fast liquidity and firm valuation. The commenter also provided examples of assets that are not readily available.

A surety provider rejected the argument that FMCSA accept self-issued or internal letters of credit. It stated that FMCSA would have no assurance or control over the quality or quantity of the security behind the letter of credit. This plan would place an administrative burden on the agency and increase the potential for losses to the intended beneficiaries.

A surety provider wrote that, to ensure that assets are readily available, they must be defined, insured, and verified. While it had previously recommended defining assets readily available as cash and an irrevocable letter of credit (ILOC) from an FDIC-insured bank, in consideration of FMCSA's desire to limit its oversight responsibilities, this commenter changed its asset recommendation to cash only. The commenter believed that allowing any other asset would add to the administrative burden of FMCSA's oversight. Because assets must be properly insured, the commenter said it is imperative that the assets be held in an FDIC-insured bank to provide FDIC insurance coverage of $250,000 per account and ensure that FMCSA does not have to underwrite or question the solvency of the bank holding the assets. The commenter maintained that an ILOC is not insured by the FDIC (even if issued by an FDIC-insured bank) unless there is a deposit of cash in an FDIC-insured bank backing the ILOC. Should FMCSA allow ILOCs, the commenter said

FMCSA would have to verify whether each bank backing the ILOC was FDIC-insured, and that the balance was under the $250,000 insurance threshold. Further, the commenter reasoned that, if cash were the only accepted form of assets readily available, the trustee could use one bank to manage all assets, creating a separate account of $75,000 for each trustor.

This same surety provider also recommended that FMCSA require trust providers to submit audited financial statements prepared by a licensed third-party certified public accountant on a quarterly basis, to lighten FMCSA's administrative burden of verifying assets. If the acceptable assets were limited to cash, the commenter believed that FMCSA could easily confirm enough cash is being held by reviewing the financial statement. However, should FMCSA wish to allow ILOCs, FMCSA would need to ensure that each BMC-85 has an ILOC from an FDIC-insured bank along with a bank account with deposits to fund the ILOC in full, making audits far more complex.

FMCSA response: In this proposal, FMCSA has designed a process that allows it to accept a wide range of financial instruments without imposing a burden on the agency's limited resources.

What Is the Capacity of the Surety Bond Industry to Meet Increased Demand?

In the ANPRM, FMCSA specifically sought comment from the surety bond industry on that industry's capacity to meet market demand if FMCSA were to adopt a cash-only standard for BMC-85 trust funds. The agency asked whether such a policy could drive a significant segment of the broker/freight forwarder industry into surety bond coverage.

Commenters responded that they believed surety-bond providers could meet this demand.

FMCSA response: The agency thanks those commenters but proposes that certain non-cash instruments could be used to meet this proposed requirement.

What Is the Cost to Brokers and Freight Forwarders of BMC-84 Surety Bonds?

FMCSA sought comments and data from the surety bond industry on the cost to brokers and freight forwarders of BMC-84 surety bonds. In response to this issue, one trust provider commented that the question should not be the cost to brokers of BMC-84 surety bonds, but what percentage of the market currently serviced by BMC-85 providers will be lost. This commenter noted that BMC-85 providers service roughly 25 percent of the total licensed freight brokers and freight forwarders in the country.

One trade organization and three surety providers provided a range of estimates of the cost of a bond. The trade organization reported that a BMC-84 bond will typically cost its principal 1 to 2 percent of the face value of the bond. A creditworthy broker or freight forwarder would expect to pay approximately $750 to $1,500 to obtain a $75,000 BMC-84 bond. The commenter did not expect that cost to increase, even with increased demand for the bonds. A surety provider wrote that pricing for this class of bond usually ranges from 2 to 5 percent of the amount of the bond, calculated and charged on an annual basis. The commenter noted that the pricing range is typically driven by the credit strength of the business and qualified indemnitors. Another surety provider commented that typical costs for license and permit bonds run from 1 to 4 percent of the face amount of the bond. A third surety provider reported that average surety premiums have dropped each year since 2013 with rates as low as $750 per year.[3] Due to the increased surety competition, while coverage has increased 750 percent (from $10,000 to $75,000), typical costs incurred by freight brokers/forwarders for their annual premiums have risen only 15 to 30 percent.

[3] According to comments provided in 2020 in connection with the Small Business in Transportation Coalition's petition for exemption from the $75,000 financial responsibility requirement, the annual surety bond premium is less than $2,000 on average. 86 FR 71538, 71542 (Dec. 16, 2021).

FMCSA response: FMCSA appreciates the comments provided and believes it has sufficient information on the cost of BMC-84 surety bonds to inform this proposed rule.

Other Comments Related to Assets Readily Available

Some commenters noted other issues related to assets readily available. Several commenters were concerned with what they believed are irregularities in the BMC-85 trust fund industry. A trade organization commented that a major concern is that certain trust fund operators are not following the laws and regulations, to the detriment of safety. If small motor carriers are not paid, necessary maintenance and repairs may be put off or ignored due to reduced cash flow.

One trade organization recommended that, in order for a BMC-85 trust fund to be equivalent to a surety bond, the BMC-85 trust fund should have a prequalification function, where a surety reviews the capabilities and financial strength of a bond applicant. It believed an adequate version of prequalification can be achieved if the broker or freight forwarder is required to fund the BMC-85 trust with its own assets. In this way, the agency and carriers would have the assurance that the brokers and freight forwarders have the operational capability to commit $75,000 of their own assets into the fund.

A surety bond provider expressed the belief, based on the comments at the roundtable and the definition of a trustee, that most BMC-85 providers are not trustees but are providing unregulated surety bond insurance without a license to do so. This commenter indicated that FMCSA must regularly examine trust providers to ensure that the defined assets meet the aggregate liability of the trust provider.

A surety provider commented that, if trusts are to be funded with a limited category of assets, without requiring significant FMCSA oversight or evaluation, trust fund administrators should be allowed to invest the assets only in highly-liquid, short

duration, and very safe investments, and it provided examples. The commenter recommended that all investments should be easily provable to the FMCSA, e.g., via investment account and bank account statements. Finally, assets under trust must never be comingled with the accounts of the trust administrator that are utilized for its day-to-day business needs.

Two commenters responded to the concern about the financial wherewithal of BMC-85 trust providers and the sufficiency of the assets in BMC-85 trusts to pay legitimate claims by motor carriers or shippers. A commenter noted FMCSA's statement in the ANPRM that representatives of the BMC-85 trust fund provider community asserted that, with one limited exception, no evidence had been provided showing that BMC-85 providers have failed to pay legitimate claims made on their trusts by motor carriers or shippers to any significant degree. The commenter also believed that no legitimate stakeholder who had suffered any financial losses had appeared. This commenter therefore did not believe that rulemaking in this regard is necessary.

A BMC-85 trust fund provider sought to refute the contention that such providers support financially unstable brokers to the detriment of motor carriers and the transportation industry in general. The commenter believes it has the largest claims database specific to this industry and said that its claims data do not support those assertions. The commenter stated that, on the contrary, many BMC-84 surety companies enter and leave the market every few years because their realized losses are much higher than initially anticipated. The commenter said many surety companies will not issue BMC-84s due to the inherent high-risk factors.

FMCSA response: FMCSA appreciates all of stakeholders' comments regarding assets readily available. Today's proposal is intended to balance protection of motor carriers and shippers with cost. FMCSA believes that its proposal will meet the

congressional goal of ensuring that motor carrier claims are paid in a timely fashion without causing significant disruption to the broker and freight forwarder industry.

C. Immediate Suspension of Broker and Freight Forwarder Operating Authority

MAP-21 provides that FMCSA shall immediately suspend the registration of a broker or freight forwarder if their available financial security falls below $75,000 (49 U.S.C. 13906(b)(5), (c)(6)). In the ANPRM the agency discussed, and invited comment on, how it could immediately suspend broker/freight forwarder operating authority registration consistent with due process requirements, e.g., by providing an appropriate opportunity for post-deprivation review.

How Can the Agency Determine That the Available Financial Security of a Broker or Freight Forwarder Has Fallen Below $75,000?

In the ANPRM, FMCSA said that it first needed to determine when the available financial security of a broker/freight forwarder is below $75,000. The agency considered effecting immediate registration suspension in either or both of two situations. First, FMCSA would suspend when it receives notice from the surety or trust fund provider that a drawdown/payout on the bond/trust has occurred, such that the available financial security is less than $75,000. The second situation would be where: a) a surety or trust fund provider gives reasonable notice of a claim to the broker/freight forwarder, b) the broker/freight forwarder does not respond, and c) the surety/trust fund provider determines that the claim is valid and provides notice of these events to FMCSA. . A trade organization supported the agency's proposed approach to triggering the agency's statutory obligation to immediately suspend registrations, saying it appeared to be a sensible proposal. A surety provider agreed that it must be "explicitly detailed as to when the security falls below $75,000."

A trade organization wrote that it supported a recommendation of Avalon Risk Management that three or more valid claims from different sources, aggregating more

than $25,000, that have remained unresolved for at least 30-days is one reasonable standard. It wrote that the agency needs to clarify what constitutes financial failure or insolvency so that the surety or trust provider will not be at risk if it invokes the procedures under 49 U.S.C. 13906(b)(6) and (c)(7) to terminate the security and start the 60-day period for submission of claims. The commenter noted that this sometimes occurs over the objections of the broker or freight forwarder.

A surety provider suggested that failure of the broker/forwarder to respond in any manner to the surety or trust fund provider in 5 business days should be sufficient to permit the surety/trust to request immediate suspension, publish the notice, and start the 60-day clock for presentation of claims.

The same commenter added that, if written evidence is provided that the validity of the claim is reasonably disputed, parties should be afforded more time. In addition, the commenter believed that failure to resolve a specified number of undisputed claims representing a specified percentage of the security after 30 days should be construed as an impairment of that security and a financial failure, triggering immediate suspension. The commenter believed that financial failure outside of bankruptcy should be a trigger for immediate suspension, but noted that "financial failure" is undefined, and the operating authority holder's actual situation is difficult to determine. While the commenter recognized that larger operators would have more claims, it asserted that best practices would keep them within these parameters.

A surety provider believed that the only scenario where the financial security amount would drop below $75,000 in the case of a surety would be if the surety were to issue some sort of refund or if the surety were to pay a claim , which would reduce the value of the trust below $75,000; thus, this section should be read in conjunction with 49 U.S.C. 13906(b)(2)(A), "Payment of Claims." However, the commenter anticipated problems with any of the scenarios in which the surety provider pays a claim against a

broker as a justification for immediate suspension. The commenter believed that a broker's failure to respond to emails and phone calls from the surety is a good indication that the brokerage is experiencing or has already experienced financial failure warranting immediate cancellation. Another situation that might trigger immediate cancellation would be if a broker responds but fails to provide information to resolve the claim within a reasonable period. The surety provider wrote that a brokerage experiencing financial failure typically uses delaying tactics to buy more time. The commenter recommended that the surety provider be able to request the immediate suspension of a brokerage, given the totality of the circumstances involved (i.e. evasive responses, delaying tactics, payments bouncing, and prior claim history). The commenter also cautioned that "any bright line rule that calls for cancellation based upon either the number or claims received or total dollar amount of claims would be difficult to apply as there is no 'one size fits all' number. Large, and even small brokerages, will get claims that may or may not be valid and that may or may not indicate 'financial failure or insolvency.'"

A trade organization provided a draft of a new § 387.307 containing a process that the commenter believed would lead to FMCSA's suspension of a broker's operating authority when required under the statute. The commenter recommended that, if by the end of 10 days following notice of the claim, the broker ignores the notice, does not dispute the motor carrier's claim, does not pay the claim, or does not provide the information and documents described in the draft section, the surety consider the motor carrier's claim valid and payable under the bond or trust. The surety would then have to notify FMCSA that the amount of available security is less than required by law, triggering the 30-day period for cancellation under 49 U.S.C. 13906(b)(4)(A). Under the commenter's proposal, the presumption of insolvency and cancellation notice would be lifted if the broker were to file a completely new bond or trust within 30 days. The commenter believed that, if a broker owes a motor carrier money and does not pay the

motor carrier, or ignores the surety's notice of the claim, FMCSA could reasonably consider the broker to be financially insolvent under 49 U.S.C. 13906(b)(6). The only time a 30-day cancellation period should run while the broker continues to do business is when there have been no valid claims filed on its bond. The commenter believed such a rule would prevent brokers from continuing to incur debt to motor carriers that is not protected by a compliant surety bond or trust.

FMCSA Response: After consideration of the comments received on the ANPRM, FMCSA proposes that the most workable standard for determining that available financial security has fallen below $75,000 is when an actual drawdown has taken place. It would then be very clear to both brokers and freight forwarders that if they don't quickly replenish their trust funds or surety bonds that their operating authority registration will be suspended.

What is the Appropriate Allowable Time Period for Brokers or Freight Forwarders to Respond to Claims?

In the ANPRM, FMCSA sought comment on the appropriate allowable time period or "cushion time" for brokers or freight forwarders to respond to claims made to guarantors, valid or otherwise. Such a grace period would give firms adequate time to adjudicate claims and settlements internally, as well as to factor in costs associated with contract noncompliance when setting their pricing.

Several individuals who commented on this process believed the broker should have 30 days to pay the driver or company. One individual added that the bond company should have 30 days after that to pay the carrier. Another commenter believed the broker needs at least 60 days from the time the notice of a violation/claim is issued to respond and up to 90 days after acknowledgement of receipt to show corrective action. A third commenter said that carriers must be paid within a day. Three individuals wrote that brokers should have their licenses revoked immediately.

A trust provider, responding to FMCSA's suggested 14-day grace period for brokerage response to a notice or claim, said a surety company's determination of cancellation is routinely made much sooner. The commenter said 5 business days is all that is necessary to determine if a brokerage is still in operation, can be contacted, and can respond appropriately to the notice of claim. The commenter emphasized that any bright line rule would not work, and instead the agency's determination should be based on the totality of circumstances and the surety's prior experience and knowledge. A trade organization, however, believed a period of at least 2 weeks is appropriate. While that commenter appreciated the need to move swiftly, it also recognized that intermediaries need time to internally investigate claims and that suspending an intermediary's registration may result in significant supply chain disruptions. The commenter reported that the 2-week period would also correspond to the 14-day response period FMCSA is considering for a proposed definition of *financial failure* that would trigger the responsibility of a guarantor to take action against the intermediary's bond or trust fund.

A surety provider believed that, if after 3 to 5 days the principal has not made payment or explained its reason for non-payment, the surety can start to presume the principal may be experiencing financial failure or insolvency. The commenter wrote that a broker or freight forwarder should be able to determine, almost immediately, why it has not paid the carrier within the period to which both carrier and broker had contractually agreed. Because not every bond termination would be due to claims, it commented that FMCSA must allow for the surety or trust provider to be able to identify when a termination should involve immediate suspension of authority.

A surety provider believed that revocation of authority immediately or within 48 hours of cancellation of bond/trust would help prevent carriers from being left with little or nothing to show for their services. The commenter wrote that there are brokers who have entered the industry who post loads with no intent on paying the carrier. It explained

that the surety or trust company will not receive a claim against these brokers for at least 30 days since, under the current regulations, brokers have an additional 30 days to broker loads before their authority is revoked by FMCSA (33 actual days). The commenter said this is one of the reasons why so many carriers receive only partial settlement of their original claim amount.

A surety provider commented that protection of motor carriers requires that a broker or freight forwarder who fails to pay should be immediately suspended or otherwise sanctioned to induce the payment. The commenter again suggested that the failure of the broker/forwarder to respond in any manner to the surety/trust within 5 business days should be sufficient to permit the surety/trust to request immediate suspension, publish the notice, and start the clock on the time to present claims. If written evidence is provided that the validity of the claim is reasonably disputed, the parties should be afforded time to resolve their issues, including reducing the claim to judgment if necessary. The commenter asserted, however, that in any case when a surety or trust provider submits a request for immediate termination, the termination should be effective within 2 business days from the request. A surety provider noted that it is difficult to establish a hard rule regarding a grace period, as each situation is unique.

FMCSA response: FMCSA is not proposing a specific time for brokers or freight forwarders to respond to claims made to surety providers or trustees in this NPRM. Parties will be able to freely negotiate appropriate time periods under their private contracts.

How Can the Agency Suspend Broker or Freight Forwarder Operating Authority?

Suspending broker or freight forwarder operating authority whenever a claim is filed against a broker or freight forwarder or its bond or trust would raise due process concerns, as the agency would be prohibiting the broker or freight forwarder from lawfully operating, without affording the company a chance to respond. In the ANPRM,

the agency wrote it would consider how it could immediately suspend broker or freight operating authority registration in a manner consistent with constitutional due process requirements, e.g., by providing an appropriate opportunity for post-deprivation review.

A surety provider commented that due process requires that the broker or forwarder be given an opportunity to address the claim and present any defenses that may exist.

A trade organization raised a Fourteenth Amendment "Equal Protection of the Law" claim and asserted that the government cannot lawfully suspend the authority of brokers and forwarders upon mere notice of cancellation and not apply the same procedure to situations in which motor carriers' insurance companies have filed similar notices of cancellation. The commenter wrote that the procedure currently in place was enacted to ensure due process and a reasonable time to respond.

A trade organization commented that a licensed property broker or freight forwarder should not have its authority suspended immediately based on claims received, because invalid claims are often made. Ensuring fair due process is an essential part of this rulemaking for the commenter and its members. Furthermore, suspending authority without due process would cause a flood of authority reinstatements and re-processing for all involved, increasing the burden on the agency.

Specifically in response to this issue, a surety provider described the existing process when a surety receives claims against a bond: 1) the surety contacts the bond principal to advise it of the claim, determine whether any defenses exist, and/or whether the claim will be promptly handled by the bond principal; 2) the surety may become aware that the business is failing and may determine the bond should be terminated; 3) when this happens, the surety gives notice of termination to FMCSA, which takes effect 30 days later. As the reporting window for claims begins, the surety may receive

more claims from other parties for transportation before and after the date on which notice of the bond termination was given to FMCSA.

A trade organization proposed detailed regulatory language that it believed would set up a clear process that would lead to FMCSA's suspension of a broker's operating authority when required under the statute. This draft language proposed by the trade organization sets out the information a motor carrier would be required to submit to a surety or trustee to make a claim and establishes that the motor carrier may not be required to provide any other information. The commenter's proposed text requires that, if the motor carrier does not submit a claim that meets the requirements, the surety may immediately provide notice of the claim's deficiencies and give the motor carrier an opportunity to refile the claim. If the motor carrier provides a copy of a judgment in its favor against the broker, the surety will consider the motor carrier's claim against the bond valid. The commenter also proposed detailed procedures the surety would use to give brokers notice of a claim against the bond, provide the broker the opportunity to pay the motor carrier and provide proof to the surety. It also proposed a procedure for a broker's response to a claim—which the broker would have to provide within 10 business days of receiving notice of a claim against its surety bond from a surety or trustee. However, the commenter noted that it did not intend for this proposed process to be a substitute for the resolution of legitimate disputed claims between brokers and motor carriers. Instead, the proposal was intended to apply when brokers ignore a surety's notice of motor carrier claims or when brokers do not bother to dispute such claims with the minimal, timely response required under the rules. This distinction was intended to ensure that sureties and FMCSA do not have the duty to resolve legitimate disputes between a broker and a motor carrier. Sureties only need to identify that there is a legitimate dispute, as described above. The same commenter also encouraged FMCSA to

adopt a process that would allow members of the public to petition the agency to revoke the registration of brokers that make a false statement at any point in the claims process.

A surety provider commented that, if it was forced to cancel a policy upon notice of a claim, freight brokers would be regularly shut down even for illegitimate claims. While forcing an immediate suspension of all freight brokers with claim activity would be better for its own bottom line, the commenter believed "it simply is not fair to freight brokers." The commenter therefore recommended that surety bond and trust providers not be forced to cancel until a claim has been paid, which would be consistent with MAP-21 section 32918. Instead, cancellation prior to claims being paid out should be left to the discretion of the surety, and this approach is consistent with that taken by many other government agencies. The commenter added that the insurance carriers that back its bonds are highly motivated to ensure that they cancel bonds with legitimate claims as soon as possible, as each legitimate claim greatly impacts the profitability of the surety industry.

FMCSA response: Based on today's proposal, FMCSA would suspend the operating authority registration of a broker or freight forwarder only in the event of a drawdown on the bond or trust. Any other formulation is administratively unworkable. Moreover, as proposed later in this NPRM, FMCSA would give brokers or freight forwarders seven business days to contest any immediate suspension action before it takes effect, in order to meet constitutional due process concerns.

Comments on Actual Incidence of Non-Payment by Brokers or Freight Forwarders

In the ANPRM, FMCSA asked for documented incidents of actual nonpayment that occurred after a financially troubled broker or freight forwarder was not immediately suspended. A trade organization commented that FMCSA must immediately suspend the registration of a broker before the broker's nonpayment to motor carriers results in claims on its bond or trust in an aggregate amount of more than $75,000. Further, it commented

that FMCSA must reject the fiction that considers a bond to be in effect until a claim is actually paid on the bond, which means the broker can continue to conduct business even if there is effectively no longer any financial security in place. The commenter wrote that, under this practice sureties now wait to confirm that they have collected all the claims triggered by the broker before making any payout. By then, the pro-rata payouts from the bond to motor carrier claimants amount to cents on the dollar. The trade organization appended to its comment an excerpt of a list of motor carrier claims against broker bonds that it had helped the motor carriers lodge with sureties and trustees. The commenter believed this list shows that the failure of the bond or trust security to cover all of a broker's debts to its motor carriers is a common problem. The commenter also provided as an example a September 2018 court case in which a BMC-84 surety provider (Merchants Bonding Co.) filed an amended complaint in interpleader asking a U.S. District Court to determine how to pay the $75,000 bond to a total of 646 claimants.

A representative of a motor carrier reported that it had not been paid for a few loads by freight brokers and could collect only about 10 percent of what was due because there were too many claims. Because the freight brokers are permitted to work for 45 days after such unpaid claims are reported, they can increase the amount they owe; however, the motor carrier believed that those brokers never intended to pay anything.

A surety provider submitted an example of a brokerage that continued to book 27 loads with a total value of more than $35,000 after cancellation had been requested. This provider commented that terminating the bond immediately does not stop claims from accumulating, but it does help mitigate damages. Further, it wrote that moving loads so close to effective cancellation decreases the motor carriers' chances of filing a claim within 60 days of effective cancellation (as they are normally contacting the surety 60 to 90 days after delivery and therefore the 60-day window for accepting applications will have passed) and increases the chances that the payout will be pro rata. A second surety

provider submitted the example of a logistics company that had accumulated $945,739 in unpaid motor carrier claims after paying out the full corpus of a $75,000 BMC-85 Trust.

A surety provider wrote that many bond principals, terminated recently due to claims, also had claims for shipments that began after the termination notice was given, but still within the time when the bond principal's FMCSA operating authority was valid. For moves that occurred after the termination notice was given, it reported that nearly all occurred within the first 14 calendar days. This commenter believed that when a bond termination is due to claims, an immediate suspension of FMCSA operating authority would prevent post-notice shipments from becoming the subject of further claims, and would prevent carriers on those shipments from encountering delays in getting paid under the bond or getting only partial payment. The commenter added that the pre-notice claims would benefit from a higher pro-rata payment.

FMCSA response: FMCSA appreciates the empirical data regarding the non-payment of claims. FMCSA renews its call in this NPRM for data that shows the amount of nonpayment that could be avoided through FMCSA's implementation of the immediate suspension provision. FMCSA believes that most brokers do not have unpaid legitimate claims. A small but significant population of brokers do fail to pay legitimate claims, however, are non-responsive to motor carriers and BMC-84/85 providers and continue accumulating claims until their FMCSA operating authority registration is revoked. Ultimately, $75,000 can be insufficient to pay the multiple unpaid claims, and motor carriers are often paid a fraction of what they are owed through interpleader proceedings. FMCSA will attempt through this rulemaking, consistent with MAP-21, to suspend the operating authority registration of these delinquent brokers before the unpaid claims exceed the value of the brokers' financial responsibility instruments.

Other Comments Related to Immediate Suspension

A trade organization commented that an unintended consequence of a larger bond is that $75,000 actually gives truly fraudulent brokers more room to steal than the original $10,000 bond. While it believed the government should enforce the laws, it concluded that "[t]he principles of laissez-faire should apply here."

Another trade organization believed that many carriers know there is little hope to recover from a bond and do not even bother filing their claims against the bond. Those who do file a claim must have the ability to file a complaint in interpleader or hire a lawyer.

A surety provider commented that the surety/trustee is being placed in the role of arbiter with further restrictions on how to execute the role. If a broker or forwarder disputes a claim, this commenter wrote, the surety or trustee has its hands tied and the claimant must be told it needs to obtain a judgment to pursue the claim. Questionable operators can continue to stack up liabilities by asserting that the claim is being taken care of but then fail to resolve the claim or provide any evidence of its invalidity. The commenter asserted that this part of the regulation needs to be changed.

FMCSA response: FMCSA appreciates these comments and believes that implementation of the proposed immediate suspension provision would reduce the time a broker is permitted to operate and accumulate claims and the number of interpleader actions that are filed.

D. Surety or Trust Responsibilities in Cases of Broker or Freight Forwarder Financial Failure or Insolvency

The ANPRM sought comments on the how *financial failure or insolvency* and *publicly advertise* should be defined in accordance with 49 U.S.C. 13906(b)(6) and (c)(7).

How Should Financial Failure or Insolvency Be Defined?

In the ANPRM, the agency suggested criteria for a definition of *financial failure* or *insolvency* (83 FR 48779, 48784). The agency wrote it is considering a definition of

financial failure or insolvency that would apply at a pre-bankruptcy stage. FMCSA suggested criteria for *financial failure or insolvency* that included situations where the broker or freight forwarder has claims against its bond/trust, is not responding to notifications from the trust or surety provider within 14 calendar days, and is not in bankruptcy proceedings.

None of the commenters on this issue believed that establishing an absolute definition of *financial failure or insolvency* would be a good idea. A trade organization suggested that FMCSA should define financial failure/insolvency simply as receipt of notice by the broker or forwarder of its inability to pay its bond/trust fund premium. The commenter also wrote that FMCSA could require brokers and forwarders to provide notice of the filing of a bankruptcy petition to their surety or trust administrator. However, this trade organization believed that anything beyond this would require the surety provider to supervise the operations of the broker or freight forwarder, which transcends the normal role of a fiduciary. A second trade organization maintained that the filing of bankruptcy by the bonded principal is the clearest, most objective test for financial failure or insolvency. The commenter stated that financial failure or insolvency should not be premised on a certain number of claims made in a certain period or an aggregate value of claims unresolved within a certain timeframe. The commenter wrote that defining financial failure or insolvency in a pre-bankruptcy context may not be practical.

A surety provider defined *financial failure or insolvency* as the inability to pay debts as they become due and referenced 11 U.S.C. 101. However, this commenter maintained that the scenario should be interpreted very broadly, allowing the surety provider to use its discretion. It also opposed any "bright line rule" based on the number of claims received, the total dollar amount of claims, or a certain number of claims in a certain time period, as there is no "one size fits all" number. Another surety provider

agreed that "insolvency is routinely defined as an inability to pay one's debt, so a broker/freight forwarder that is not paying its bills when they come due meets this insolvency definition." However, the commenter believed it may not be possible to define *financial failure or insolvency*, and recommended FMCSA consider reasonable interpretations by the surety and trust industry of that standard.

FMCSA response: FMCSA agrees with the commenter who believes that defining *financial failure or insolvency* as a bankruptcy filing (or State insolvency filing) is the most appropriate and practical. FMCSA outlines its rationale for such a standard later in this preamble.

How Should Publicly Advertise Be Defined?

In the event of financial failure or insolvency, surety providers must publicly advertise for claims for 60 days beginning on the date FMCSA publishes the surety's notice to cancel the surety bond/trust (49 U.S.C. 13906(b)(6)(B), (c)(7)(B)). In the ANPRM, FMCSA wrote that it is considering a definition of *publicly advertise* that would deem notice to FMCSA of the financial failure or insolvency of the broker or freight forwarder as publicly advertising for claims under MAP-21 (83 FR 48779, 48785). The agency also reported that it is investigating whether it can flag such cancellation notices with a special code, so that potential claimants reviewing a broker or freight forwarder's records on the FMCSA website would know that the 60-day period to make a claim has begun.

Most of those who commented on this issue believed that the requirement to publicly advertise should be satisfied by the surety provider giving notice to FMCSA, which FMCSA would then make publicly available. However, one trade organization recommended that FMCSA publish a notice in the *Federal Register*. A second trade organization commented that if insolvency is based on bond claims FMCSA could ask the surety to notify the agency of all claims made on the bond, which would allow the

agency to determine if financial failure or insolvency triggered by outstanding claims has occurred. If financial failure or insolvency was based on the principal's bankruptcy, the agency could require notice of the bankruptcy filing. This commenter believed that FMCSA serving as a centralized, public location that brokers or freight forwarders could monitor for these notices would be far more efficient than each surety posting notice on its respective website.

A trade organization believed that if FMCSA provided public notice of cancellation under 49 U.S.C. 13906(b)(4)(B), motor carriers could look up a broker's registration status before taking a load from that broker. Such FMCSA notice would also provide the dates that the 60-day claims period commenced and the due date for claims to be filed with the surety on the bond. The commenter recommended that FMCSA change its Licensing and Insurance page to provide a link to the surety's webpage indicating how many unresolved claims have been submitted against the bond, similar to FMCSA's publication of motor carrier inspection and accident data on the Motor Carrier Management Information System.

In addition to notice on the FMCSA website, several surety providers suggested posting on the surety provider's website or FMCSA providing a hyperlink to the provider's website. A surety provider believed that flagging the posting with a code identifying the reason for cancellation (claim activity vs. non-compliance) would benefit both motor carriers and other surety providers, as many of these "bad" brokerages jump from surety to surety, leaving claims behind. This commenter also believed that, as approved filers with login credentials, surety providers should be provided access to all information and documentation that has been filed with FMCSA (e.g., Application for Motor Property Carrier and Broker Authority filing, Unified Registration System information) by the provider for which they have completed the BMC-84 or BMC-85 filing. A surety provider believed FMCSA should host the list of entities in financial

failure or insolvency across all surety companies and trust providers in one location to make it easier for the public to become aware of these notices. A third surety provider wrote that the requirement to publicly advertise would be satisfied by maintaining the information on the surety/trust website, augmented by listing the payees upon closure of the case. One surety provider noted that these public advertisements are only of value if they are easily found and recommended a consolidated location.

A surety provider wrote that upon cancellation of a BMC-84 surety bond or a BMC-85 trust, the issuer of the bond or trust should be required to post the cancellation and advertise for claim submission on its website for no less than 60 days. The commenter asked FMCSA to allow 30 days for the surety or trust provider to investigate the claim and an additional 30 days to make payment or denial (citing reason) to claimant: 60 days to advertise, plus an additional 60 days to investigate and settle claim.

FMCSA response: Consistent with the position of most commenters, FMCSA will consider the surety or trust's duty to publicly advertise claims to be met through the provision of notice of financial failure or insolvency to FMCSA. In this NPRM, FMCSA proposes to post such notices in the FMCSA Register section of its website to provide a centralized location for notice of claims periods.

Other Comments Related to Surety or Trust Responsibilities

Sureties or trust fund providers will have to commence action to cancel broker or freight forwarder surety bonds or trust funds in the event of broker/freight forwarder financial failure or insolvency (49 U.S.C. 13906(b)(6), (c)(7)). To effectively implement this provision, commenters provided other insights on surety or trust responsibilities in these cases.

A trade organization suggested that the requirements for the qualifications for trustees and trusts be sufficiently effective so that trustees are compelled to do better

underwriting of brokers, eliminating those from the industry who may be likely to default on their payments to motor carriers.

A surety provider noted that the authority for pro-rata payments to claimants who have filed following publication of the need to file claims but before the cut-off date, should be explicitly set out in the regulations to protect the surety or trust and eliminate any delay in making payments to motor carriers.

FMCSA response: FMCSA believes that this NPRM would improve regulation of trustees and lead to fewer brokers or freight forwarders defaulting on their payments. Regarding the latter comment, FMCSA does not believe that a specific provision in the regulations is necessary because the statute regarding pro-rata payment of claims is self-implementing.

E. Enforcement Authority

Surety Suspension Procedures Under 49 U.S.C. 13906(b)(7) and (c)(8)

The agency sought input on the development of surety suspension procedures authorized pursuant to 49 U.S.C. 13906(b)(7) and (c)(8). FMCSA has authority under MAP-21 to suspend non-compliant surety providers from providing broker or freight forwarder financial responsibility for 3 years, seek civil penalties against surety providers, and sue non-compliant surety providers in Federal court. In the ANPRM, the agency noted that it expects to establish a procedure for suspensions where it will issue an order to show cause against a non-compliant surety provider, weigh any evidence submitted by the provider, and make a final decision. (83 FR 48785)

A trade organization commented that FMCSA's enforcement authority is likely to be exercised mainly against sureties providing BMC-85 trusts since Treasury has authority to regulate sureties providing BMC-84 bonds. It supported the use of the simplified show cause procedure proposed by FMCSA, adding that the show cause order should be published to allow interested members of the public to comment. This trade

organization recommended that, in order to ensure funds are available to pay motor carrier claims without a large expenditure of agency resources, the agency should require trust providers to issue only fully funded trusts and allow the market to regulate this by requiring the trustor to publish a list of valid claims paid on a publicly accessible website. According to the commenter, this information is currently required to be submitted to FMCSA, and the commenter believed there is no reason it should not also be made publicly available, so that motor carriers and others can see for themselves whether a trust provider is paying valid claims. The commenter wrote that the agency must make the distinction between "paid claims" and "filed claims." Only valid claims paid should be required to be filed with the agency. This same trade organization commented that, in order to show that a trustee is holding $75,000 in cash or a cash equivalent for each of the brokers for whom it has filed a BMC-85, FMCSA should require the trustees to file audited financial statements with the agency showing the number of brokers for whom it has filed BMC-85 forms with the FMCSA, and the value and type of assets it is holding in trust to support them. The commenter said that FMCSA should make these audited financials publicly available so that the beneficiaries of these trusts can determine whether the trusts are fully funded with liquid assets "readily available to pay claims." If they are not, then the Government should take enforcement action by cancelling the trust's registration number and terminating its ability to file BMC-85s.

A second trade organization laid out the surety's duties and procedures in detail in a draft proposed rule. The commenter believed these rules would define the limits of the surety's liability and remove any concerns that it must wait to collect all potential claims before paying claims on the bond. This trade organization encouraged FMCSA to adopt a process that would allow a member of the public to petition the agency to revoke the right of a surety or trustee to file bonds and trusts with the agency, if that surety or trustee has

failed to follow the procedures in its draft § 387.307, Property broker surety bond or trust fund.

A surety provider wrote that a BMC-84 surety provider or BMC-85 trust fund provider becomes insolvent when it is unable to pay claims or redemptions upon demand. The commenter believed that when FMCSA can verify this, the agency should issue a notice to show cause and demand the surety provide proof of financial stability. If the surety is unable to adequately respond, FMCSA should issue a notice to the holders of the respective BMC-84s or BMC-85s that their "proof of minimum financial responsibility" will be suspended in 30 days if they do not obtain alternative surety filing.

A surety provider believed that FMCSA should suspend or revoke a surety or trust provider's authority to file BMC-84s or BMC-85s only if a written complaint with supporting evidence was filed with FMCSA, investigated, and ruled on by FMCSA as to suspension or revocation. The commenter stated that FMCSA must clearly define compliance rules before suspension or revocation is adopted practice.

A surety provider wrote that FMCSA must be certain any regulations or procedures it adopts do not conflict with Treasury's regulations in 31 CFR 223.17(b), regarding an agency's decision to refuse to accept a bond from a surety listed on OMB Circular 570. The commenter noted that, while FMCSA may determine that the Treasury procedure is enough, U.S. Customs and Border Protection has regulations outlining how that agency determines when to refuse to accept a surety's bond (19 CFR 113.38), without creating a referral to Treasury for removal from OMB Circular 570. This surety provider commented that the suspension of the eligibility to provide surety bonds or trust functions, on behalf of FMCSA financial responsibility instruments, must not be the result of any arbitrary or capricious decision making.

A surety provider believed if any trust provider is found not to be holding the funds required in support of the aggregated trusts they have underwritten or if a surety

loses its authority granted by Treasury, that provider should immediately lose its authority to provide bonds or trusts. However, since suspension of the surety or trust will impact all of the principals for bonds issued by that surety or trust, the matter must be taken seriously and not be solely triggered by a complaint. The commenter believed the agency should provide the surety or trust with a notice to show cause why its authority should not be suspended, together with a list of particulars, and should provide the surety or trust with an opportunity for a hearing. The commenter said that if the agency has concerns, industry would expect it to initiate a dialogue so that the surety or trust might address those concerns before it reaches a show cause condition.

A surety provider recommended that FMCSA provide bond and trust providers the ability to post information related to surety suspension procedures on the FMCSA website, or to have the information sent to the FMCSA for posting.

FMCSA response: After consideration of the comments, FMCSA proposes a surety or trust suspension procedure as described later in this preamble and consistent with what it described in the ANPRM.

Other Comments Related to FMCSA's Enforcement Authority

Commenters provided other views related to FMCSA's enforcement authority. A trust fund provider noted that "the lone imploding BMC-85 provider, Oasis Capital, Inc., which exited the marketplace owing claimants and redemptions, was a singular event." This commenter maintained that there is no other evidence of BMC-85 providers not paying claims or not providing redemptions to their customers. By contrast, another commenter asserted that there is evidence, revealed by a Google search, that BMC-85 providers have failed to pay legitimate claims. It also reported no claim issues can be found doing similar online searches for BMC-84 providers.

Another trade organization urged the agency to require all BMC-85 trust providers to submit timely notice of the financial failure of any of their clients and to

make information regarding claims paid publicly available. The commenter wrote that underfunded or insolvent trust fund providers "tarnish the brokerage industry and disadvantage those operating legally, enable irresponsible brokers to continue operating without adequate security, and cheat motor carriers, thereby lessening the safety of the transportation industry." The commenter reported that when owner-operators do not get paid, they may not be able to invest adequately in maintenance and safety improvements. The commenter wrote that FMCSA must enforce the law and give its highest priority to ensuring that trust providers are fully funded.

While it understood that the agency focus is on safety, a trade organization believed that the economic well-being of small business motor carriers has a huge impact on safety because the loss of one payment can cause a motor carrier to defer maintenance and run harder until it makes up the shortfall. The commenter provided suggested regulatory text that it believed would keep persons with little financial backing from entering the broker industry, reducing the need for FMCSA enforcement action.

FMCSA response: After consideration of the comments, FMCSA proposes a surety or trust suspension procedure as described later in this preamble and consistent with what it described in the ANPRM.

F. Entities Eligible to Provide BMC-85 Trust Fund Filings; Should BMC-85 Providers Be Licensed as Trust Providers?

Under MAP–21, FMCSA has broad authority to determine who is eligible to provide trust fund services on behalf of brokers or freight forwarders. A broker must file a surety bond or trust fund from a provider "determined by the Secretary to be adequate to ensure financial responsibility" (49 U.S.C. 13906(b)(1)(A)). Section 13906(c)(1)(A) contains similar language for freight forwarders. Under current regulations, a financial institution may file trust funds (§ 387.307). In addition to other types of entities, loan or finance companies are considered financial institutions pursuant to § 387.307(c)(7). In

the ANPRM, the agency asked whether FMCSA should require BMC-85 trust fund providers to be licensed as trust providers. It also asked how § 387.307(c)(7) (loan or finance company) could be amended to ensure adequate monitoring of BMC-85 providers' ability to pay claims.

A number of commenters believed that providers of BMC-85 trust funds should be licensed as trust providers.

A surety provider believed that, while requiring BMC-85 trust providers to become licensed trust providers would add further regulatory oversight, the government agencies that provide the trustee licenses would not enforce or know the proper amount of assets that the trustees should have in trust. The commenter wrote that FMCSA needs to provide further oversight of the BMC-85 trusts. The commenter reported that when the BMC-85 trust providers were directly asked at the May 2016 roundtable if they were collecting $75,000 to be held in trust, none claimed they were. Instead, they collect a small percentage annual fee, akin to unlicensed surety bonds, with none of the regulatory oversight or safeguards. The commenter wrote that a trust license requirement would not change this, but oversight and regulation from the FMCSA could.

FMCSA response: After consideration of the comments, FMCSA is not proposing that BMC-85 trust providers be licensed as trust companies. Given both the proposed enhanced asset quality requirements and the requirement that BMC-85 trustees be more robustly monitored by financial regulators, FMCSA believes it is unnecessary to require that BMC-85 providers be licensed as trustees given the added cost such a requirement may impose.

Other Comments Related to Which Entities Should Be Eligible to Provide Trust Funds

A trade organization endorsed the previously filed comments of the Association of Independent Property Brokers & Agents and quoted from them extensively regarding what it believed is a conflict-of-interest issue regarding "the current practice of non-profit

entities engaging in the normally for-profit business of selling or the brokering of financial security." The commenter believed that instead of working to fulfill important MAP-21 mandates, industry had been asked to "engage in furtherance of what we believe is nothing more than a trust fund supplier 'witch hunt' asked for by competing BMC-84 bond issuers and/or other entities that represent themselves as bona fide, non-profit trade groups, but are actually for-profit BMC-84 bond peddlers in disguise." The commenter recommended that FMCSA restrict industry trade groups from selling financial security instruments.

A surety provider suggested FMCSA consider promulgating regulations establishing financial criteria that FMCSA believes BMC-85 trust funds should meet. FMCSA could then require annual reports by independent accountants from every BMC-85 trust company that wants to obtain filer authority, verifying that these criteria had been met. If the company did not provide this annual report, its authority would be revoked. The BMC-85 trust company would need to have assets readily available that exceed the liability for trust funds on deposit. The commenter believed a process like this would be relatively easy for FMCSA to monitor.

A trade organization demanded a change to the licensing process because of the lack of a qualified, independent monitoring source and false reliance on a State's initial issuance/reissuance of its business license. The commenter believed that loan or finance companies should not be treated as financial institutions, because of concerns that States will not monitor BMC-85 providers' ability to pay claims from a trust or, further, monitor such companies for enforcement purposes. The commenter also believed that the National Insurance Producers Registry license is only an industry-sponsored listing service of insurance agents and brokers.

FMCSA response: FMCSA does not believe that there is a need to restrict industry trade groups from selling financial instruments. FMCSA's authority is limited to

ensuring that BMC-85 trust fund providers are adequately regulated and suitable for administering trust funds. Whether such providers are industry associations is not relevant to that determination.

In regard to the comment suggesting that trustees be required to have annual reports from independent accountants to measure their compliance with FMCSA regulations, FMCSA believes that such a requirement would impose cost upon trustees that is unnecessary. FMCSA believes that the proposed regulatory structure, where trusts will need to contain high quality financial instruments that are available to meet $75,000 in claims, along with the enhancement of the regulatory requirements for being a BMC-85 trustee, will make such an annual reporting requirement unnecessary.

Finally, FMCSA agrees with commenter's suggestion that being a loan or finance company is not sufficient to serve as a BMC-85 trustee. Through its outreach to financial regulators and their representatives, FMCSA has received robust feedback that loan or finance companies are not adequately regulated and hence inappropriate for serving as stewards of money held in trust for motor carriers and shippers.

G. Revisions to Forms BMC-84 and BMC-85

The agency anticipated the need for revisions to the BMC-84 and BMC-85 forms if a rulemaking was proposed. In the ANPRM, FMCSA requested comments to identify suggested changes to the forms.

After review of the BMC-84, a trade organization found it to be well drafted. The commenter's only recommendation was that the form require the surety underwriting the bond to be a corporation appearing on Treasury's list of approved sureties and certified, pursuant to 31 U.S.C. 9304 through 9308, to provide bonds to the Federal Government.

A surety provider suggested that the best approach to revising the forms would be incorporating regulatory language by reference, rather than repeating language found in the FMCSA regulations.

Two surety providers believed there is no need to modify the forms except to conform to changes from rulemaking.

A trade organization encouraged the agency, if it does change these forms or adopt an electronic version for filing, to revise them to state that "no provision on the form or in a contract or agreement between a broker and a surety or trustee, or a contract or agreement between a broker and motor carrier, can conflict with or exempt any party from their rights or duties under the new rules. Nor can any such contract bind a person to waive their rights or duties under the new rules." The commenter also believed the forms should state that the contract includes by reference all applicable provisions of 49 U.S.C. 13906 and the regulations themselves. The commenter also noted that electronic filing of some fields from the physical documents has caused confusion as to the contents of the form. There are provisions on the BMC-84 setting legal responsibilities and liabilities that are not provided by the current statute or regulations.

A surety provider believed that removing the 30-day cancellation clause, allowing a trust or bond company to cancel on demand, will reduce the number of claims and lower premiums.

FMCSA response: FMCSA appreciates the comments submitted by stakeholders. FMCSA may propose revisions to the BMC-84 and BMC-85 forms to align with any changes made to the regulations as a result of this rulemaking. While any revised forms will be made available for comment in a future notice, FMCSA also welcomes comments in response to the NPRM on items to consider for inclusion or revision.

H. Should HHG Brokers and Freight Forwarders Be Regulated Differently?

FMCSA asked whether HHG brokers and freight forwarders should be regulated differently than general property brokers and freight forwarders in a rulemaking on broker/freight forwarder financial responsibility. Two surety providers believed that HHG brokers should be regulated differently. One commenter noted that the movement

of HHG deals directly with the public. The second commenter also noted that HHG shippers are consumers who know very little about the transportation industry. This commenter wrote that in its experience this segment of the industry often violates existing regulations regarding estimates and carriers holding loads hostage. It suggested that enforcement of the existing regulations would reduce those problems.

A surety provider wrote that, from an underwriting standpoint, it is unlikely that the surety industry will view HHG differently. The surety market underwriters already have the ability to segregate policies based on their operations and have chosen not to do so.

A trade organization representing the moving industry believed that any additional fraud protections imposed by FMCSA should apply only to online HHG brokers. A second trade organization representing the moving industry did not believe that additional fraud protections pertaining to HHG brokers were warranted.

FMCSA response: FMCSA has decided not to propose regulations dealing specifically with HHG brokerage or freight forwarding at this time. FMCSA believes that it is most useful to continue to address moving fraud through other means. Moreover, there is no requirement in 49 U.S.C. 13906 to issue HHG-specific rules.

I. Market's Ability to Address Broker/Freight Forwarder Noncompliance

FMCSA sought comment on whether the market is able to address broker/freight forwarder noncompliance. For example, if a broker or freight forwarder has a history of noncompliance with contracts, wouldn't surety or trust firms be less likely to back them, or to charge a higher premium or trust fund management fee? Is there a market failure that is preventing these transactions from taking place efficiently?

Three surety providers agreed that sureties would decline to provide BMC-84s or BMC-85s to any broker or freight forwarder with a known history of noncompliance with a BMC-84 or BMC-85, except under special circumstances. These commenters reported

that the problem is with reincarnated brokers and freight forwarders that slip through the process. One of these commenters wrote that sureties collect a variety of personal identification information as part of the underwriting process to ferret out reincarnated entities, but this does not always prevent these entities from finding another surety, because such information cannot be disclosed unless the surety is required to provide it to the agency. Another of these surety providers believed that a consolidated public posting of the MC number, company name, and name of the owner(s) of noncompliant brokers and freight forwarders would help combat reincarnated companies.

A surety provider noted that the whole industry should vet the broker or freight forwarder using FMCSA's Licensing and Insurance website, before entering any monetary relationship.

FMCSA response: FMCSA appreciates the information provided through the ANPRM and has considered it in forming our proposed rule. As explained elsewhere in this document, FMCSA has attempted to strike an appropriate balance in how additional regulations may positively or negatively impact those affected by the proposed changes. FMCSA encourages stakeholders to review the proposal and provide comments and particularly data, where possible, to support their positions.

J. Comments on Other Aspects of MAP-21 Section 32918

FMCSA requested comments on any other aspects of implementing MAP-21 section 32918 that may be necessary, including how these areas could be implemented in a way that would not divert scarce safety oversight resources.

One trade organization offered detailed proposed regulatory text. It suggested that FMCSA's primary role in an NPRM would be to promptly publish on its Licensing and Insurance website: 1) information provided by sureties about when a broker obtains a bond or trust that complies with the rules; 2) information regarding the status of the broker's registration; and 3) the website link provided by the surety with which the public

can obtain information about the current bond. By making public timely information about pending bond claims and the status of a broker's registration, the commenter wrote that the motor carrier can choose whether to do business with a broker or not.

A surety provider indicated that a license as a premium financing company, available in all 50 States, with oversight by each State's department of insurance or banking department, would relieve FMCSA of the need for an annual review, leaving its limited resources available for safety oversight. The commenter included a table describing the licensing requirements for each State.

A surety provider believed that limiting the acceptable financial instruments to BMC-84 surety bonds is the best way to ensure that FMCSA does not divert its resources because the BMC-84 bond is the only product that relies strictly on other government agencies for solvency and claims handling. The commenter maintained that BMC-84 surety bonds are less expensive than BMC-85 trusts. The same commenter wrote that while there are thousands of bond requirements similar to the $75,000 freight broker bond at the local, State, and Federal level, the Government agencies issuing the requirements rely on other Government agencies to regulate the companies backing the risk, which allows them to focus on their regulatory duties. For surety bonds (BMC-84), third party trusts (BMC-85), ILOCs from FDIC-insured banks, and cash, the commenter provided two tables describing which Government agencies regulate each product and what percentage of obligees accept each product. The commenter noted that FMCSA is the only Government agency that allows third-party trust companies to hold the ILOCs or cash on behalf of the agency, greatly adding to FMCSA's oversight responsibilities.

FMCSA response: FMCSA appreciates the insight provided by the commenters and the details on varying requirements across the States. FMCSA reviewed and considered this information in the development of this NPRM.

Small Business Impacts

FMCSA requested comment on the small business impacts of its suggested courses of action in the ANPRM. An individual commenter believed this to be the single most crucial question the agency asked. He reported that small business truckers must be fully compensated in order to operate safely; if they are not justly compensated for their efforts, they have been failed by the system which is in place to protect them.

A trust fund provider noted that thousands of freight brokers are small business owners; any disruption to their bond placement or in their potential authority status may result in lost revenues. The commenter also wrote that many BMC-85 providers also qualify as small businesses that could be put out of business if FMCSA adopts a cash-only standard for BMC-85 trust funds.

A surety provider wrote that, if BMC-85s continue to be offered as an option, FMCSA must communicate where to report claim issues and must handle complaints in a timely fashion or small freight carriers will continue to be forced to close. The commenter added that only FMCSA can positively impact small freight carriers that have been harmed by the lack of BMC-85 trust regulation.

FMCSA response: FMCSA understands the differing implications of regulations, and the absence of regulations, on the affected entities and has considered the impacts both from broker nonpayment on small motor carriers and from more stringent requirements on small brokers and freight forwarders in the development of this NRPM. The impact to surety bond and trust fund providers was also considered in the development of this NPRM.

K. Miscellaneous Comments on the ANPRM

Some commenters raised issues or offered explanations that were related to broker/freight forwarder financial responsibility but outside the specific issues that FMCSA raised in the ANPRM. A trade organization proposed regulatory language to ensure that a broker operates and incurs debt to motor carriers only when it has the

amount of security required by statute. This commenter asked for industry input on the reasons for a legitimate dispute between a broker and carrier over payment of a load so they could be incorporated into the regulations. Other than claiming that it did not contract with the broker, the commenter believed that the only legitimate dispute would be one where the shipper or receiver of the load in question had memorialized a claim in a document given to the broker stating with particularity that the motor carrier did not perform the transportation as agreed to. The commenter noted that, when brokers go out of business with claims exceeding the amount of the bond, those claims are rarely the subject of a dispute between the broker and the carrier.

This same commenter noted that these financial security rules are important for the smooth function and safety of the motor carrier industry. If the rulemaking produces effective steps for the resolution of motor carrier claims against a bond or trust, this trade organization believed that "disputes between motor carriers and sureties will be reduced, there will be less need for litigation, less need for FMCSA intervention, and the economic health of the broker/motor carrier component of the transportation industry will be stronger."

In response to the agency's assertion that FMCSA had heard little from the BMC-85 industry, a trust fund provider complained that FMCSA had failed to consider his comment properly. In his June 16, 2016 post-round table comments, this surety provider wrote that his company "reiterates and incorporates the entirety of PFA's post-event 'comments regarding the FMCSA roundtable on May 20, 2016.'" This same surety provider believed that FMCSA did not appropriately distinguish between the legitimate interests of motor carriers and shippers and the "often questionable benefits" of BMC-84 surety providers.

A factoring company noted that it endorsed the submissions of Transport Financial Services. The commenter wrote that attendees at a transportation factoring

software users conference agreed that BMC-85 trust providers are preferable to BMC-84 surety providers with respect to economically regulated transportation claims processing and better informed regarding such specialized activity than the licensed insurance adjusters handling a much wider range of claims. A surety provider believed a rulemaking alone would not provide the adequate changes needed to solve the issues posed by BMC-85s.

Commenters believed that FMCSA should do more to screen brokers. An individual wrote that FMCSA should require more proof of financial stability from brokers, and the broker or forwarder should prove this to the shipper too. The commenter recommended creating a reporting portal that would provide a track record of issues with on time payments or other issues that FMCSA could investigate and act on.

One individual believed that FMCSA is not doing enough to vet brokers that fail to pay carriers and then close their doors, change their business name, and/or file for bankruptcy, leaving the surety to handle the debt. The commenter wrote that FMCSA needs to collect the social security number of the brokers, their spouses, and managing partners and then create a database to monitor and even reject "fly by night" operations. The commenter recommended that FMCSA make it a criminal act to lie on the property broker application and provided examples of questions intended to weed out chameleon brokers.

A number of commenters believed that the bond amount should be higher than $75,000. However, one trade organization commented that the $75,000 bond is too high and serves as an unreasonable barrier to entry. It recommended it be lowered by Congress to $25,000. Another surety provider wrote that raising the financial requirement for brokers and freight forwarders only increased the amount of money unscrupulous operators could steal.

FMCSA Response: FMCSA appreciates these comments and may address them if they are renewed in response to this NPRM. The $75,000 minimum requirement is currently mandated by statute. 49 U.S.C. 13906(b)(3) and (c)(4).

VII. DISCUSSION OF PROPOSED RULEMAKING[4]

Assets Readily Available

This NPRM proposes to allow brokers and freight forwarders to meet MAP-21's assets readily available requirement by maintaining trusts that have assets that can be liquidated within 7 business days of the event that triggers a payment from the trust, as certified on a BMC-85, and that do not contain the following assets:

(1) Interests in real property;

(2) Intercorporate agreements or guarantees;

(3) Internal Letters of Credit;

(4) Certain assets determined by States to be illiquid including second trust deeds, personal property and vehicles;

(5) Bonds that do not receive the highest rating from a credit rating agency (a nationally recognized statistical rating organization registered with the Securities and Exchange Commission); and

(6) Any other asset that the broker cannot certify (on a BMC-85) will be available in the amount of $75,000 within 7 business days.

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4 Unless "freight forwarder" is specifically referenced in these proposed regulations, all changes to broker financial responsibility requirements are applicable to freight forwarder financial responsibility pursuant to 49 CFR 387.403T(c) and 49 CFR 387.403(c). The agency requests comment on whether the agency should adopt separate regulatory changes on freight forwarder financial responsibility that mirror the broker regulations or maintain the current adoption by reference .

After consideration of the 2016 roundtable discussion and associated comments and the comments in response to the 2018 ANPRM, FMCSA proposes the list of assets that are not suitable for a BMC-85 trust fund above.

First, the Agency believes that 7 business days is a reasonable period for an asset to be considered "readily" available for liquidation. That will give the broker or freight forwarder adequate time to convert the asset to cash (if not cash already) but it will be available for claimants within a reasonably short period, and indeed quicker than routine collection of commercial debt in other contexts.

Second, FMCSA carefully developed the list of assets that it will not consider to be "assets readily available." It addresses each of these in turn.

FMCSA does not believe interests in real property should be in BMC-85 trust funds as such interest may be difficult to liquidate within 7 business days. Moreover, the value of real property fluctuates, and FMCSA is concerned that an interest in real property initially worth $75,000 will not retain its value at the time of a claim on a bond or trust.

Second, intercorporate guarantees or agreements are dependent on the financial health of the guarantor, which makes their availability in the case of a drawdown uncertain. In addition, FMCSA lacks the information and resources to monitor the financial health of guarantors.[5]

Third, FMCSA does not believe internal letters of credit are appropriate for BMC-85s. In order for FMCSA to accept letters of credit in BMC-85 trust funds, the Agency needs to be confident that the issuer of the letter of credit is able to pay a claim in the event of a drawdown. Internal letters of credit do not appear to provide such reassurance.

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[5] While the agency does accept corporate guarantees in its self-insurance program, pursuant to 49 U.S.C. 13906(d), such guarantors are part of a package of collateral that the agency requires. Moreover, the agency employs a financial contractor to assist it in that program. The agency's ability to monitor such instruments in the context of a program with fewer than 50 participants is very different from its ability to assess intercorporate agreements or guarantees of thousands of brokers and freight forwarders.

FMCSA is aware that a leading trust fund provider uses internal letters of credit in its trust funds, and the agency welcomes comments on how it can be assured that such letters of credit will be available for the payment of claims.

Fourth, in preparing this proposed rule, FMCSA explored whether States have defined assets readily available. FMCSA learned that at least two States have considered second trust deeds, personal property, and vehicles to be illiquid.[6] Accordingly, given the need for assets to be "readily available," the agency cannot accept these illiquid assets, and it proposes to prohibit these assets from being maintained in trust funds.

Fifth, FMCSA has determined that given their higher default risk, bonds that are not considered the highest rated by a nationally recognized statistical rating organization (NRSRO),[7] are too risky to be considered readily available for the payment of claims. FMCSA welcomes comment on whether a less restrictive approach may protect motor carriers and shippers.

Finally, to provide maximum flexibility for BMC-85 trust providers and brokers and freight forwarders, FMCSA will allow all other assets in trusts, provided the broker or freight forwarder can certify under penalty of perjury that the asset will be convertible to cash within 7 business days of the event triggering its liquidation. This rule also proposes a 3-year compliance date to give time for brokers or freight forwarders to meet the new asset requirement. FMCSA believes this will allow brokers and freight forwarders to transition to the new standard.

FMCSA invites comments from the public regarding other types of assets that should not be considered assets readily available. FMCSA also requests comments from

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[6] 10 CCR section 1780 (second trust deeds); Haw. Admin. Rules section 17-675-2 (personal property and vehicles).

[7] NRSROs are those organizations registered with the Securities and Exchange Commission (SEC) pursuant to authority in the Exchange Act, 15 U.S.C. 78c(b), 78o–7, 78q, 78w, and 78mm, and SEC regulations in 17 CFR sec. 240.17g-1. A list of the ten currently registered NRSROs is available on the SEC's website. See https://www.sec.gov/ocr/ocr-current-nrsros.html (retrieved Oct. 18, 2022).

the public regarding whether a comprehensive list of appropriate assets is possible or desirable.

Entities Eligible to Provide Trust Funds for BMC-85 Filings

FMCSA proposes removing loan and finance companies from the list of entities authorized to serve as BMC-85 trustees. FMCSA reaches this conclusion for several reasons. First, FMCSA is not a financial regulator, and given its primary safety mission it must rely on other regulators to regulate the trustees that provide BMC-85 trust funds. In that regard, FMCSA is concerned that loan and finance companies are not adequately regulated at the State level for the purpose of issuing BMC-85s. Because these entities are unregulated, they may engage in practices that create risk to the public. Specifically, many of these loan and finance companies offer access to a $75,000 trust via a monthly membership fee. This business model is not within the intent of MAP-21and may not provide the readily available assets to pay claims. Its meetings with both State and Federal regulators were informative on this point. CSBS indicated that loan companies are not looked at for safety and soundness or financial condition. They are generally examined for consumer protection compliance. Moreover, there are too many companies for the amount of state examination capacity. The FDIC indicated that state finance companies are not regulated as robustly as FDIC insured banks. And, the Florida Office of Financial Regulation, which regulates Florida "consumer finance companies," one of which is a significant provider of BMC-85 trusts, indicated that there is no regulation of these companies in the business that FMCSA allows them to be engaged in. FMCSA welcomes comments from BMC-85 providers and others as to why loan and finance companies are adequately regulated for the purpose of issuing BMC-85s, as opposed to being regulated by states for either purpose.

FMCSA also proposes a 3-year compliance date for trustees to meet these new requirements to allow BMC-85 providers to transition.

Group Surety Bonds/Trust Funds

FMCSA does not currently allow the use of group surety bonds or group trust funds (78 FR 54720, 54721, Sept. 5, 2013), and this NPRM does not propose any changes to the agency's position. After considering the comments on the ANPRM and additional agency discussion, FMCSA determined that the use of these bonds and funds would not be likely to provide a cost savings for brokers and freight forwarders, as brokers and freight forwarders would still need to hold $75,000 in financial responsibility. In addition, group surety bonds/trust funds are difficult and costly to administer. As noted in the comment discussion, the main proponent of their inclusion in implementation of 49 U.S.C. 13906(b) and (c) has since acknowledged that they are inappropriate for FMCSA financial responsibility requirements, a factor which FMCSA finds highly persuasive.

Immediate Suspension of Broker/Freight Forwarder Operating Authority

FMCSA proposes a new process for an immediate suspension of broker or freight forwarder operating authority. If there is an actual drawdown on a broker/freight forwarder surety bond or trust fund, FMCSA will provide notice to the broker or freight forwarder that it has 7 business days to provide evidence to FMCSA that the surety or trust has been replenished. If it does not provide such notice, FMCSA will suspend that broker or freight forwarder's operating authority registration.

A drawdown would be defined as a situation where one of the following occurs: (1) a broker or freight forwarder consents to the drawdown and the instrument value drops below $75,000; (2) a broker or freight forwarder does not respond to adequate notice of a claim by a surety or trust fund provider, the surety or trust provider pays the claim, and the instrument value drops below $75,000; or (3) a claim is reduced to a judgment, the surety or trust fund provider pays the judgment and the instrument value drops below $75,000.

This proposal also requires that FMCSA provide the broker or freight forwarder notice of the pending suspension and give it 7 business days to replenish the funds. If it does not replenish the funds, the broker's or freight forwarder's registration will be suspended via second notice. FMCSA believes that 7 business days gives the broker or freight forwarder reasonable time to replenish the surety bond or trust account, while also implementing Congress's mandate that broker or freight forwarder operating authority registration be immediately suspended in the event the broker/forwarder's financial security falls below $75,000.

Surety or Trust Responsibilities in Cases of Broker/Freight Forwarder Financial Failure or Insolvency

FMCSA proposes to define *financial failure or insolvency* as a bankruptcy filing or State insolvency filing. If there is a financial failure or an insolvency of the broker or freight forwarder and the surety or trustee is notified of the bankruptcy or insolvency filing, then the surety or trustee must notify FMCSA of the filing and initiate cancellation of financial responsibility. After considering responses to the ANPRM, FMCSA more fully appreciates the value of an objective test of financial failure or insolvency such as a bankruptcy or insolvency filing.[8] This approach will minimize disputes and allow for efficient implementation of this statutory provision. The agency also notes that Congress defined a similar term "insolvent" in the bankruptcy code at 11 U.S.C. 101(32). Given that similar term's placement in the Bankruptcy Code, it is appropriate to use bankruptcy law to define "financial failure or insolvency" in the implementation of the MAP-21 provisions.

Consistent with FMCSA's primary safety mandate, the agency seeks to implement this statute in a way that involves clear guidelines for surety and trust providers with minimal agency involvement is. FMCSA believes this proposal

[8] See comments of the Surety & Fidelity Association of America, available in the docket at https://www.regulations.gov/document/FMCSA-2016-0102-0022.

accomplishes that goal. To the extent that brokers, sureties, or trustees are concerned about the bankruptcy implications of this approach, FMCSA recognizes that those entities may need to seek relief from the bankruptcy court to take action on the BMC-84 or BMC-85 instruments in the event of a bankruptcy. Given that a formal bankruptcy or insolvency filing is required, FMCSA expects few instances where this portion of the NPRM will be triggered.

Further, MAP-21 requires that sureties or trustees "publicly advertise" for claims in the event of a broker or freight forwarder financial failure or insolvency. FMCSA proposes that once the surety or trustee has notified FMCSA of the financial failure or insolvency, it will have met its statutory mandate to "publicly advertise." FMCSA will help ensure that claimants are aware of the claims filing period by posting notice of the claims period on the FMCSA Register on its website. All claims will need to be filed directly with the surety or trustee.

Enforcement Authority

FMCSA proposes to implement MAP-21's surety provider suspension authority provision by providing notice of suspension to the surety or trust fund provider, allowing 30 calendar days (extended to the next business day if the final day of the period falls on a weekend or Federal holiday) for the surety or trust provider to respond, before the agency makes a final decision.

FMCSA proposes to add language to 49 CFR part 386 to address civil penalties authorized by 49 U.S.C. 13906(b) and (c) as well.

VIII. SECTION-BY-SECTION ANALYSIS

This section includes a summary of the proposed changes to 49 CFR parts 386 and 387. The regulatory changes proposed are discussed in numerical order.

Appendix B to Part 386 - Penalty Schedule: Violations and Monetary Penalties.

In Appendix B to part 386, a new paragraph (g)(24) would be added to highlight the monetary penalty for which a surety company or financial institution found in violation of 49 U.S.C. section 13906 or § 387.307 would be liable.

Section 387.307 Property broker surety bond or trust fund.

In § 387.307(b), a new standard for trust funds allowed under the section would be added. Existing paragraph (c)(7) would be removed and existing paragraph (c)(8) would be renumbered as paragraph (c)(7). New paragraphs (e), (f), and (g) would be added.

Paragraph (e) would set out the triggers and procedures for immediate suspension of a broker. The paragraph would establish the role of the surety provider or financial institution, FMCSA, and the broker.

Paragraph (f) would set out procedures and responsibilities for a surety company or a financial institution and FMCSA following financial failure or insolvency of a broker. A financial failure or insolvency of a broker would be defined as a filing related to the broker pursuant to Title 11 of the United States Code or a filing related to the broker under an insolvency or similar proceeding under State law.

Paragraph (g) would set out procedures concerning suspension of a surety company or financial institution's ability to file evidence of financial responsibility with FMCSA and FMCSA's role in that action. Penalties for violation of the requirements of this section or subsection (b) of Title 49, section 13906 U.S.C. would be established.

IX. REGULATORY ANALYSES

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The Office of Information and Regulatory Affairs (OIRA) determined that this rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563

(76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. This rule is also not significant within the meaning of DOT regulations (49 CFR 5.13(a)). Accordingly, the Office of Management and Budget has not reviewed it under these Orders. A draft regulatory impact analysis is available in the docket. That document:

- Identifies the problem targeted by this rulemaking, including a statement of the need for the action.
- Defines the scope and parameters of the analysis.
- Defines the baseline.
- Defines and evaluates the costs and benefits of the action.

Copies of the full analysis are available in the docket or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Summary of Estimated Costs

Brokers and freight forwarders, surety bond and trust fund providers, and the Federal Government would incur costs for compliance and implementation. The quantified costs of the proposed rule include notification costs related to a drawdown on a surety bond or trust fund, and immediate suspension proceedings, FMCSA costs to hire new personnel, and costs associated with the development and maintenance of the BMC-84/85 Filing and Management IT System. FMCSA estimates that the 10-year cost of the proposed rule would total $5.4 million on an undiscounted basis, $3.8 million discounted at 7 percent, and $4.6 million discounted at 3 percent (all in 2020 dollars). The annualized cost of the rule would be $545,505 discounted at 7 percent and $542,343 at 3 percent. Ninety-eight percent of the costs would be incurred by the Federal Government.

Summary of Estimated Benefits

This proposed rule would result in benefits to motor carriers amounting to a decrease in the claims that go unpaid. FMCSA expects this result for a number of reasons. First, FMCSA proposes to immediately suspend brokers that do not respond following a drawdown on their financial security. This step should alleviate broker non-payment issues as financially insecure brokers would have less time to run up claims they may never pay, while operating lawfully. Building the BMC-84/85 Filing Management System would efficiently exchange information between motor carriers, brokers, financial responsibility providers, and FMCSA, thereby reducing the information asymmetry concerns associated with broker and carrier transactions. Given a lack of data, FMCSA is unable to quantify benefits resulting from this rule, but qualitatively discusses benefits directly related to three provisions in the regulatory impact analysis.

FMCSA cannot directly estimate an impact on safety resulting from the proposal. OOIDA[9] contends that broker non-payment of claims causes smaller carriers to defer maintenance on their vehicles or "run harder until they make up the shortfall," both resulting in unsafe driving practices.[10] TIA contends that "small carriers and owner-operators often operate on thin financial margins and need the revenue from every load to maintain their equipment so that it meets roadworthiness and safety requirements. If they are not paid, necessary maintenance and repairs may be put off or ignored because of the reduced cash flow." If the proposal is finalized, carriers would have more information to avoid contracting with unscrupulous brokers and would also receive payment for work completed in a timelier manner, without use of interpleader proceedings. Both of these outcomes could lead to an increase in safety if motor carriers choose to use these resources to further their safety focus.

[9] This comment is available in the docket at https://www.regulations.gov/document/FMCSA-2016-0102-0076

[10] TIA also references potential safety benefits of this rulemaking, available in the docket at https://www.regulations.gov/document/FMCSA-2016-0102-0032.

B. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801-808), the Office of Information and Regulatory Affairs (OIRA) designated this rule as not a "major rule."[11]

C. Advance Notice of Proposed Rulemaking

Under 49 U.S.C. 31136(g), FMCSA is required to publish an ANPRM or proceed with a negotiated rulemaking, if a proposed rule is likely to lead to the promulgation of a major rule. However, this requirement does not extend to rulemakings promulgated under the agency's jurisdiction pursuant to 49 U.S.C. 13501 or 13531, which are the basis of this rulemaking. Nonetheless, on September 27, 2018, FMCSA voluntarily published an ANPRM (83 FR 48779).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, Pub. L. 96-354, 94 Stat. 1164 (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, Mar. 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111-240, 124 Stat. 2504, Sept. 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term "small entities" comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. FMCSA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities.

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[11] A "major rule" means any rule that the OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of $100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (49 CFR 389.3).

Therefore, FMCSA is publishing this initial regulatory flexibility analysis (IRFA) to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. We invite all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. We will consider all comments received in the public comment process when making a determination in the Final Regulatory Flexibility Assessment.

An IRFA must contain the following:

1. A description of the reasons why the action by the agency is being considered;
2. A succinct statement of the objective of, and legal basis for, the proposed rule;
3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

Why the Action by the Agency is Being Considered

In 2012, Congress enacted MAP-21, specifically, section 32918, which contained requirements for the financial security of brokers and freight forwarders that amended 49 U.S.C. 13906. FMCSA proposes modifications to broker and freight forwarder financial responsibility requirements in accordance with the MAP-21 mandate. On September 27, 2018, FMCSA published an ANPRM (83 FR 48779) saying that the

agency was considering changes or additions to eight separate areas: Group surety bonds/trust funds, assets readily available, immediate suspension of broker/freight forwarder operating authority, surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency, enforcement authority, entities eligible to provide trust funds for form BMC-85 trust fund filings, Form BMC-84 and BMC-85 trust fund revisions, and HHG.

The Objectives of and Legal Basis for the Proposed Rule

In 2012, Congress enacted section 32918 of MAP-21, which contained requirements for the financial security of brokers and freight forwarders, amending 49 U.S.C. 13906. Congress mandated that the agency issue a rulemaking to implement the new statutory requirements MAP-21 section 32918(b). Congress mandated that FMCSA conduct rulemaking to implement the statutory changes. The objective of this rulemaking is to complete the implementation of Congress's directive and to help ensure that motor carriers are paid for the services they provide for brokers and freight forwarders.

A Description of, and Where Feasible an Estimate of, the Number of Small Entities to Which the Proposed Rule Will Apply

Small entity is defined in 5 U.S.C. 601. Section 601(3) as having the same meaning as *small business concern* under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4) includes within the definition of *small entities* not-for-profit enterprises that are independently owned and operated and are not dominant in their fields of operation. In addition, Section 601(5) defines *small entities* as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

This proposed rule would affect financial responsibility providers, brokers, and freight forwarders.

The financial responsibility providers that would be affected by this proposed rule operate under many different North American Industry Classification System[12] (NAICS) codes with differing size standards. Additionally, the financial responsibility providers that would be affected by the rule are a subset of the entities within these codes. Many of the entities operating under these NAICS codes have various functions that do not include providing financial responsibility to brokers or freight forwarders. In providing a wide range of NAICS codes in the finance and insurance sectors, FMCSA believes it captures financial responsibility providers who perform various other functions. Table 2, below, shows the Small Business Administration (SBA) size standards for finance and insurance, which ranges from $8 million in revenue per year for insurance agencies and brokerages, to $600 million in revenue per year for commercial banking.

Brokers and freight forwarders operate in the transportation sector under the NAICS code 48851. As shown in Table 2, the SBA size standard for freight transportation arrangement is $16.5 million in revenue.

Table 2 SBA Size Standards for Selected Industries (in millions of 2019$)

NAICS Code	NAICS Industry Description	SBA Size Standard
Subsector 522 – Credit Intermediation and Related Activities		
52211	Commercial Banking	$600
52229	All Other Nondepository Credit Intermediation	$41.5
Subsector 523 – Securities, Commodity Contracts, and Other Financial Investments and Related Activities		
52312	Securities Brokerage	$41.5
52313	Commodity Contracts Dealing	$41.5
52314	Commodity Contracts Brokerage	$41.5
52321	Securities and Commodity Exchanges	$41.5

[12] More information about NAICS is available at: (accessed June 29, 2022).

52391	Miscellaneous Intermediation	$41.5
Subsector 524 – Insurance Carriers and Related Activities		
524126	Direct Property and Casualty Insurance Carriers	$41.5
524127	Direct Title Insurance Carriers	$41.5
524128	Other Direct Insurance (except life, health, and medical) Carriers	$41.5
52413	Reinsurance Carriers	$41.5
52421	Insurance Agencies and Brokerages	$8
524292	Third Party Administration of Insurance and Pension Funds	$35
Subsector 488 – Support Activities for Transportation		
48851	Freight Transportation Arrangement	$16.5

FMCSA examined data from the 2017 Economic Census, the most recent Census for which data were available, to determine the percentage of firms that have revenue at or below SBA's thresholds within each of the NAICS industries.[13] Boundaries for the revenue categories used in the Economic Census do not exactly coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to make reasonable estimates as to the percent of small entities within each NAICS industry group.

The commercial banking industry group has a revenue size standard of $600 million. The largest Economic Census revenue category is $100 million or more. As such, FMCSA could not determine the percent of entities within this NAICS industry group that would be considered small, and conservatively estimates that all commercial banking entities are small entities as defined by the SBA.

[13] U. S. Census Bureau. *2017 Economic Census*. Available at: https://data.census.gov/cedsci/table?q=EC1700&n=48-49&tid=ECNSIZE2017.EC1700SIZEREVEST&hidePreview=true (accessed Apr. 20, 2022).

For Other Nondepository Credit Intermediation, the $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of Other Nondepository Credit Intermediates with revenue less than these amounts were 50 percent and 54 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 50 percent and is using that figure.

The Securities Brokerage industry group focuses on underwriting securities issues and/or making markets for securities and commodities. The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of Securities Brokerages with revenue less than these amounts were 97 percent and 98 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of securities brokerages that are small will be closer to 97 percent and is using that figure.

The Commodity Contracts Dealing industry group focuses on acting as agents between buyers and sellers of securities and commodities (52313). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of commodity contracts dealers with revenue less than these amounts were 75 percent and 81 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of commodity contracts dealers that are small will be closer to 75 percent and is using that figure.

The Commodity Contracts Brokerage industry group focuses on providing securities and commodity exchange services (52314). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of

commodity contracts brokers with revenue less than these amounts were 84 percent and 86 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of commodity contracts brokers that are small will be closer to 84 percent and is using that figure.

The Securities and Commodity Exchanges industry group provides marketplaces and mechanisms for the purpose of facilitating the buying and selling of stocks, stock options, bonds or commodity contracts (52321). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. There are 13 total firms that operated for the entire year under the securities and commodity exchanges industry group, but the Census has redacted the number of firms with revenue less than $100 million. The Census reports that there are four firms with revenue of $100 million or greater, which leads FMCSA to estimate that there are nine firms with revenue below $100 million. FMCSA conservatively estimates that all nine firms with revenue below $100 million (69 percent of the industry group) are considered small.

The Miscellaneous Intermediation industry group primarily engages in acting as principals in buying or selling of financial contracts (52391). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of miscellaneous intermediation firms with revenue less than these amounts were 97 percent and 99.6 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of miscellaneous intermediates that are small will be closer to 97 percent and is using that figure.

The Direct Property and Casualty Insurance Carriers industry group primarily engages in initially underwriting insurance policies (524126). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two

Economic Census revenue categories, $25 million and $100 million. The percentages of direct property and casualty insurance carrier firms with revenue less than these amounts were 81 percent and 88 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of direct property and casualty insurers that are small will be closer to 81 percent and is using that figure.

The Direct Title Insurance Carriers industry group primarily engages in initially underwriting title insurance policies (524127). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of direct title insurers with revenue less than these amounts were 66 percent and 67 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of direct title insurers that are small will be closer to 66 percent and is using that figure.

The Other Direct Insurance Carriers industry group primarily engages in initially underwriting insurance policies (524128). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of other direct insurance carriers with revenue less than these amounts were 58 percent and 63 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of other direct insurance carriers that are small will be closer to 58 percent and is using that figure.

The Reinsurance Carriers industry group primarily engages in assuming all or part of the risk associated with insurance policies originally underwritten by a different provider (52413). The SBA size standard for this industry group is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $10 million and $100 million. The percentages of reinsurance carriers with revenue less

than these amounts were 49 percent and 60 percent, respectively. The SBA threshold is not near either of these revenue categories, FMCSA conservatively estimates that the percent of reinsurance carrier firms that are small will be closer to 60 percent and is using that figure.

The Insurance Agencies and Brokerages industry group primarily engages in selling insurance (52421). The SBA size standard for this industry group is $8 million. The $8 million SBA threshold falls between two Economic Census revenue categories, $5 million and $10 million. The percentages of insurance agencies and brokerages with revenue less than these amounts were 98 percent and 99 percent, respectively. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of insurance agencies and brokerages that are small will be closer to 99 percent and is using that figure.

The Third Party Administration of Insurance and Pension Funds industry group primarily engages in providing third-party administrative services of insurance (524292). The SBA size standard for this industry group is $35 million. The $35 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of firms with revenue less than these amounts were 92 percent and 97 percent, respectively. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of firms that are small will be closer to 92 percent and is using that figure.

The Freight Transportation Arrangement industry group primarily engages in arranging the transportation of freight between shippers and carriers (48851). The SBA size standard for this industry group is $16.5 million. The $16.5 million SBA threshold falls between two Economic Census revenue categories, $10 million and $25 million. The percentages of firms with revenue less than these amounts were 93 percent and 97 percent, respectively. Because the SBA threshold is closer to the lower of these two

boundaries, FMCSA has assumed that the percent of firms that are small will be closer to 93 percent and is using that figure.

Table 3 below shows the complete estimates of the number of small entities within the NAICS industry groups that may be affected by this rule. FMCSA notes that there are approximately 375 entities providing financial responsibility services (i.e., entities that have filed BMC-84s or BMC-85s with FMCSA on behalf of brokers), which is a small subset of the firms identified in the commercial industry groups below.

Table 3 Estimates of Numbers of Small Entities

NAICS Code	Description	Total Number of Firms	Number of Small Entities	Percent of all Firms
52211	Commercial Banking	4,804	4,804	100 percent
52229	All Other Nondepository Credit Intermediation	10,411	5,255	50 percent
52312	Securities Brokerage	6,009	5,832	97 percent
52313	Commodity Contracts Dealing	493	368	75 percent
52314	Commodity Contracts Brokerage	728	608	84 percent
52321	Securities and Commodity Exchanges	13	9	69 percent
52391	Miscellaneous Intermediation	6,912	6,715	97 percent
524126	Direct Property and Casualty Insurance Carriers	2,079	1,675	81 percent
524127	Direct Title Insurance Carriers	662	438	66 percent
524128	Other Direct Insurance (except life, health, and medical) Carriers	285	166	58 percent

52413	Reinsurance Carriers	129	77	60 percent
52421	Insurance Agencies and Brokerages	106,260	105,056	99 percent
524292	Third Party Administration of Insurance and Pension Funds	2,498	2,306	92 percent
48851	Freight Transportation Arrangement	13,252	12,332	93 percent

A Description of the Proposed Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This NPRM would include recordkeeping requirements pertaining to small financial responsibility providers and brokers. These entities would be required to provide notification to FMCSA of specific activity on a broker bond or trust fund. FMCSA anticipates that these notifications can be completed by office clerks.

A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

FMCSA attempted to draft a proposed rule that would minimize any significant economic impact on small entities. FMCSA is proposing a 3-year compliance date in an effort to allow ample time for small entities to meet the requirements of the rule. This compliance date takes into account the resources available to small entities. FMCSA is not aware of any significant alternatives that would meet the intent of our statutory requirements but nevertheless requests comment on any alternatives that would meet the intent of the statute and prove cost beneficial for small entities.

Description of Steps Taken by a Covered Agency to Minimize Costs of Credit for Small Entities

FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act and has taken no steps to minimize the additional cost of credit for small entities.

Requests for Comment to Assist Regulatory Flexibility Analysis

FMCSA requests comments on all aspects of this initial regulatory flexibility analysis.

E. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996,[14] FMCSA wants to assist small entities in understanding this proposed rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

F. Unfunded Mandates Reform Act of 1995

[14] Pub. L. 104–121, 110 Stat. 857, (Mar. 29, 1996).

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $178 million (which is the value equivalent of $100 million in 1995, adjusted for inflation to 2021 levels) or more in any 1 year. Though this NPRM would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the agency discusses the effects of this proposed rule elsewhere in this preamble and in the regulatory impact analysis available in the docket.

G. Paperwork Reduction Act

This proposed rule does not propose new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The agency is not proposing any changes to Forms BMC-84 and BMC-85 at this time but will consider whether it needs to modify Forms BMC-84 and BMC-85 after reviewing the comments on this NPRM. Should revisions to the forms be deemed necessary, the agency will seek approval of revised forms from OIRA during the 3-year compliance period we propose for portions of this rule.

H. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

FMCSA has determined that this rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have

sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

I. Privacy

The Consolidated Appropriations Act, 2005,[15] requires the agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This NPRM would not require the collection of personally identifiable information (PII). The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,[16] requires Federal agencies to conduct a Privacy Impact Assessment (PIA) for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form.

No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

In addition, the agency submitted a Privacy Threshold Assessment to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

J. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal

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[15] Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).
[16] Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

K. National Environmental Policy Act of 1969

FMCSA analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, paragraphs 6.k and 6.q. The categorical exclusions (CEs) in paragraph 6.k and 6.q cover broker activities and implementation of record preservation. The proposed requirements in this rule are covered by these CEs and do not have any effect on the quality of the environment.

List of Subjects
49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 387

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

For the reasons set forth in the preamble, FMCSA proposes to amend 49 CFR parts 386 and 387 as follows:

PART 386 – RULES OF PRACTICE FOR FMCSA PROCEEDINGS

1. The authority citation for part 386 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 49 U.S.C. 113, 1301 note, 31306a; 49 U.S.C. chapters 5, 51, 131-141, 145-149, 311, 313, and 315; and 49 CFR 1.81, 1.87.

2. Amend Appendix B by adding paragraph (g)(24) to read as follows:

Appendix B to Part 386 - Penalty Schedule: Violations and Monetary Penalties

* * * * *

(g) * * *

(24) A surety company or financial institution for a broker or freight forwarder pursuant to §§ 387.307 or 387.403T and violates subsection (b) or (c) of Title 49 of the United States Code, Section 13906 or § 387.307, is liable to the United States for a penalty of $10,000 for each violation.

* * * * *

PART 387 – MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

3. The authority citation continues to read as follows:

Authority: 49 U.S.C. 13101, 13301, 13906, 13908, 14701, 31138, 31139; sec. 204(a), Pub. L. 104-88, 109 Stat. 803, 941; and 49 CFR 1.87.

4. Amend § 387.307 by:

a. Revising paragraph (b) to read as set forth below;

b. In paragraph (c)(6), adding the phrase “or” after the semicolon;

c. Removing paragraph (c)(8);

d. Redesignating paragraph (c)(8) as paragraph (c)(7); and

e. Adding paragraphs (e), (f), and (g) to read as set forth below.

The revision and additions read as follows:

§ 387.307 Property broker surety bond or trust fund.

* * * * *

(b) *Evidence of Security*. Trust funds under this section must contain assets aggregating to $75,000 that can be liquidated to cash within 7 business days. Assets included in any trust fund filed under this section shall not include interests in real property, intercorporate agreements or guarantees, internal letters of credit, illiquid assets (such as second trust deeds, personal property and vehicles), bonds that have not received the highest rating from a nationally recognized statistical rating organization registered

with the Securities and Exchange Commission, or any other asset the broker cannot certify on Form BMC-85 is convertible to cash within 7 business days.

* * * * *

(e) *Immediate suspension*. (1) If a surety company issuing a Form BMC-84 or a financial institution issuing a Form BMC-85 makes a payment from the surety bond or trust fund for a claim from a shipper or motor carrier as described in paragraph (b) of this section: (1) with the consent of the broker; (2) when the broker fails to respond to notice of a claim within 14 calendar days of notice by the surety company or financial institution; or (3) when there is a judgment against the broker, the surety company or financial institution shall notify FMCSA of the payment and its amount. The surety company or financial institution shall provide written notice of such payment to FMCSA via electronic means.

(2) Upon notification by the surety company or financial institution in accordance with paragraph (e)(1) of this section, FMCSA shall provide written notice to the broker that its operating authority issued pursuant to part 365 will be suspended within 7 business days of the date of the notice unless the broker provides written evidence to FMCSA that the surety bond or trust fund has been restored to the $75,000 amount required by this section. FMCSA will provide a second written notice to the broker of any suspension.

(f) *Financial failure or insolvency of the broker.* (1) If a surety company or financial institution is notified of the financial failure or insolvency of a broker, such surety company or financial institution shall initiate cancellation of the Form BMC-84 or Form BMC-85 pursuant to paragraph (d)(2)(i) of this section. A financial failure or insolvency of a broker is defined as a filing related to the broker pursuant to Title 11 of the United States Code or a filing related to the broker under an insolvency or similar proceeding under State law.

(2) Upon notification by the surety or financial institution, FMCSA shall immediately provide written notice of the cancellation in the FMCSA Register on its public website. The surety or financial institution shall accept claims against the BMC-84 surety bond or BMC-85 trust fund for 60 calendar days (extended to the next business day if the final day of the period falls on a weekend or Federal holiday) following FMCSA's public notification of the financial failure or insolvency in the FMCSA Register.

(g) *Suspension of surety company or financial institution.* (1) If a surety company or financial institution violates the requirements of this section or subsection (b) of Title 49, section 13906 of the United States Code, FMCSA may suspend the authorization of such surety company or financial institution to have its instruments filed as evidence of financial responsibility pursuant to § 387.307 for 3 years.

(2) If FMCSA initiates a suspension action pursuant to paragraph (g)(1) of this section it shall provide written notice to the surety company or financial institution, provide 30 calendar days (extended to the next business day if the final day of the period falls on a weekend or Federal holiday) for the surety company or financial institution to provide evidence contesting such proposed suspension, and then render a final decision in writing.

Issued under authority delegated in 49 CFR 1.87.

Robin Hutcheson,
Administrator.

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